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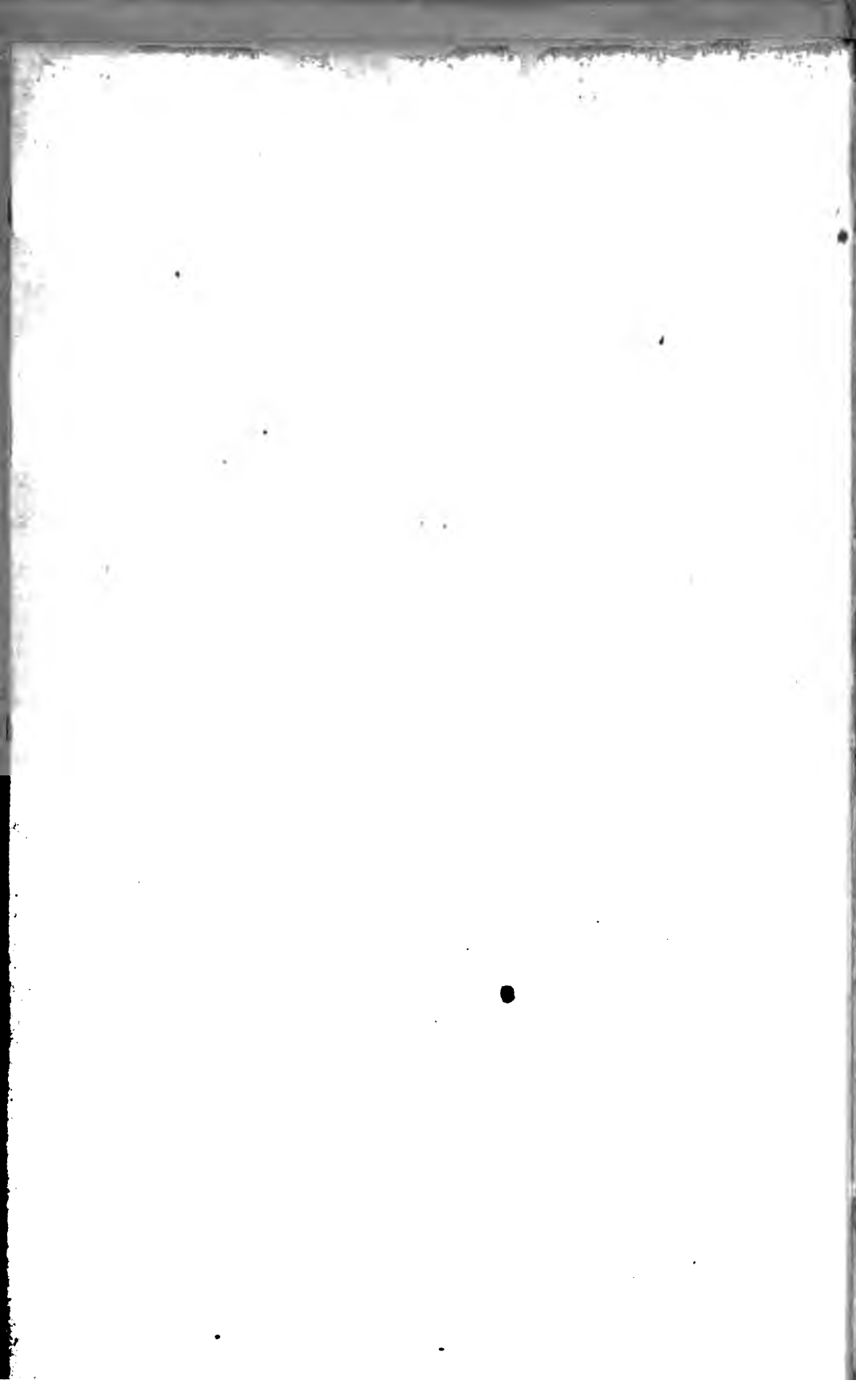
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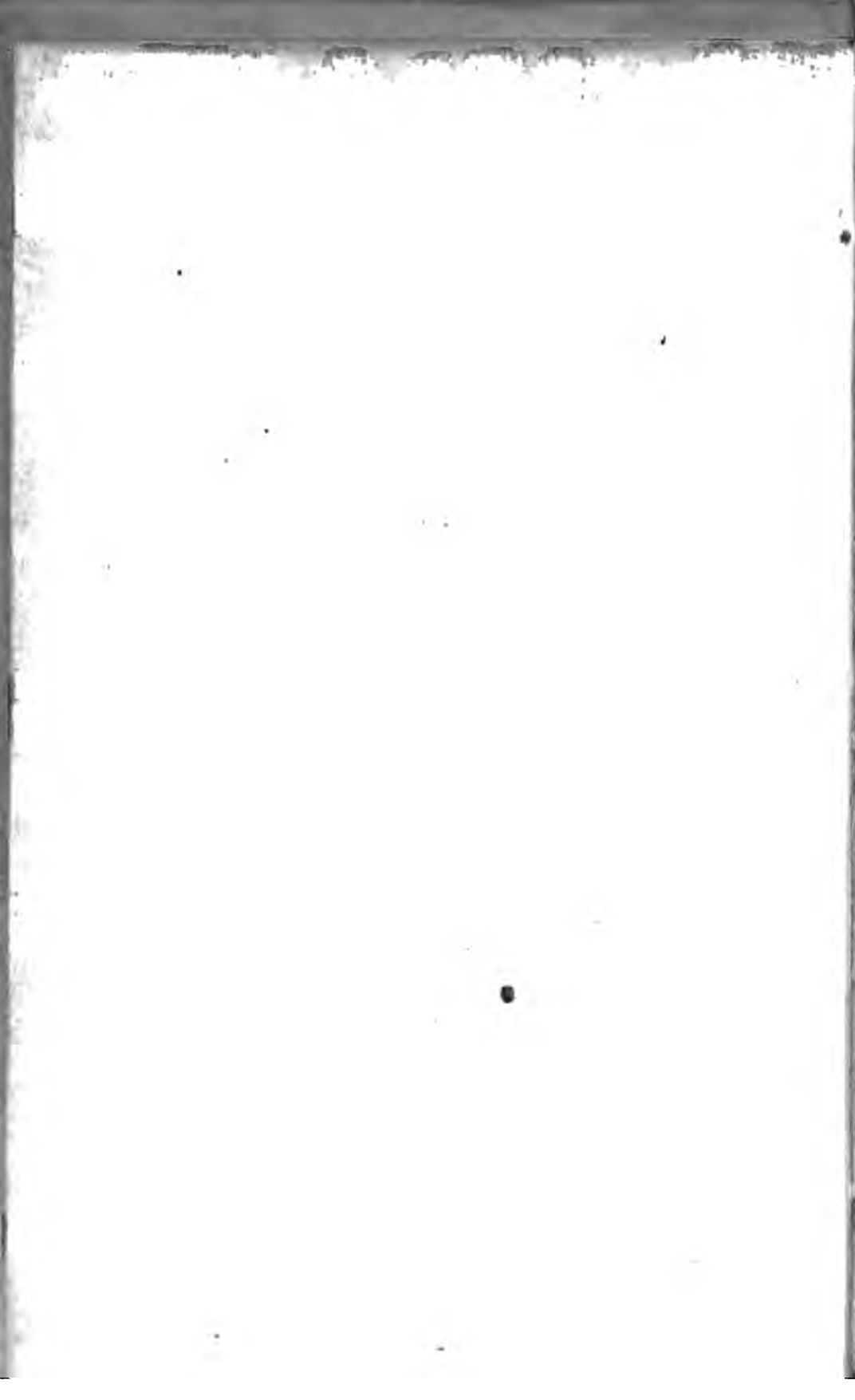
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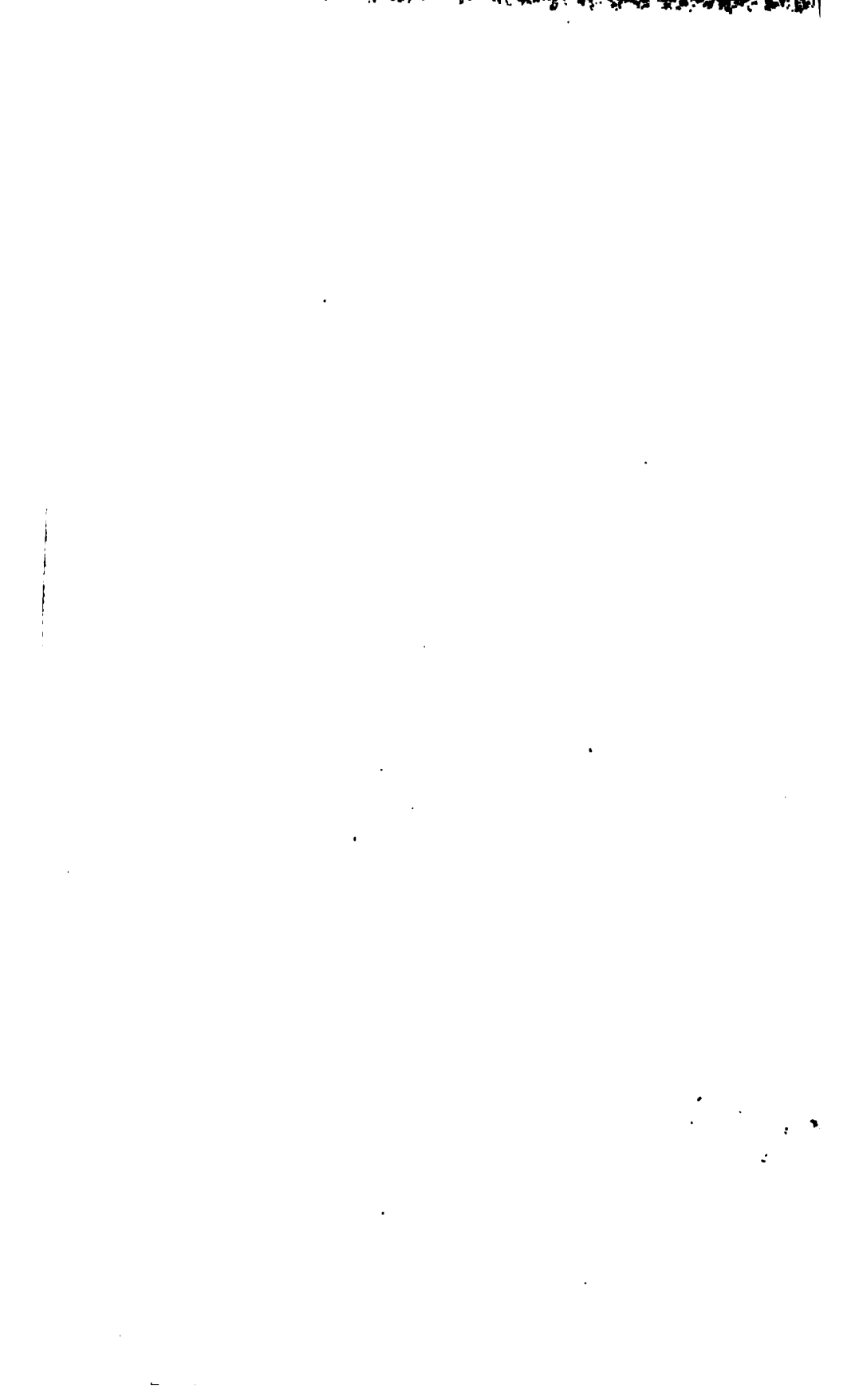


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v. 3



REPORTS OF CASES
DECIDED IN THE
COURT OF PROBATE
AND IN
THE COURT FOR
Divorce and Matrimonial Causes.

WITH TABLES OF THE NAMES OF CASES, AND
INDEXES TO THE PRINCIPAL MATTERS.

BY
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AND
THOMAS HUTCHINSON TRISTRAM, D.C.L.,
ADVOCATE IN DOCTORS' COMMONS, AND OF THE INNER TEMPLE.

VOLUME III.
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JUDGES AND LAW OFFICERS.

Judges of Her Majesty's Court of Probate

DURING THE PERIOD OF THESE REPORTS.

The Right Honourable SIR CRESSWELL CRESSWELL, Knight,

AND

The Right Honourable SIR JAMES PLAISTED WILDE, Knight.

Attorneys-General.

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Queen's Advocate-General.

SIR ROBERT JOSEPH PHILLIMORE, Knight.

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REPORTS OF CASES

DECIDED IN THE

COURT OF PROBATE

AND IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

In the Goods of GEORGE MARTIN (deceased).

*Practice.—Administration.—Will of Married Woman.—
Limited Probate.—Cæterorum Grant.*

1862.

November 4.

In the Goods of
GEORGE
MARTIN.

A. died, leaving a will, whereby he appointed his wife sole executrix and universal legatee. She proved A.'s will, and afterwards married B., and during her coverture made a will in execution of a power vested in her, and appointed B. sole executor. Upon her death, B. took limited probate of her will, and also administration of the rest of her effects :

HELD, that B., as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A.

George Martin died on the 2nd of November, 1837, leaving a will and codicil, whereof he appointed his wife Sarah Martin sole executrix and universal legatee, to whom, on the 1st of December, 1837, probate was granted by the Prerogative Court of Canterbury. Sarah Martin afterwards married William Beavan, and died on the 14th of April, 1861, leaving a will, executed on the 15th of December, 1856, which, after

Budge
4 P.D. 77

1862. reciting certain indentures of settlement, executed in contem-
 November 4. plation of her marriage with William Beavan, contained the
 In the Goods of following clause :—" In execution of these powers, and of every
 GEORGE
 MARTIN. " other power, trust, or authority in anywise enabling me on
 " this behalf, I do, by this my last will and testament, direct,
 " limit, and appoint that all and singular the real estates,
 " chattels real, and personal estates, property, and effects
 " whatsoever and wheresoever, over which I have any power
 " and disposition, shall immediately from and after my decease
 " go," etc.; and she appointed William Beavan, her husband,
 sole executor. On the 1st of July, 1861, William Beavan
 obtained probate of this will, limited to the estate which Sarah
 Beavan had power to dispose of and had disposed of; and on
 the 19th of May, 1862, he obtained a grant of administration
 of the rest of the personal estate of Sarah Beavan.

Dr. Spinks moved for a grant of administration to William Beavan of the unadministered personal estate and effects of George Martin.

SIR C. CRESSWELL: The only question is as to the form in which the grant should be made; whether, as was done *In the Goods of Bayne*, 1 Swab. & Trist. 132, there should not be a supplemental grant of probate, limited to the property which Mrs. Beavan had as executrix.

Dr. Spinks: In that case there was not, as here, a *cæterorum* grant, but only a limited probate. Mrs. Beavan was universal legatee as well as executrix, under the will of her first husband, and Mr. Beavan, by taking probate of his wife's will and administration to the rest of her effects, represents the whole of her personal estate.

SIR C. CRESSWELL: I think you are entitled to the grant in the form in which you have asked it.

RIDGWAY v. ABINGTON and Others.

*Revocation of Probate.—Interest misdescribed in Citation.—
Amendment of Citation.—Costs.*

1862.

November 4.

RIDGWAY
v.
ABINGTON
AND OTHERS.

The plaintiff, in the citation to bring in probate, described himself as one of the lawful cousins and next of kin of the deceased, and upon an order obtained by the defendants that he should propound his interest, filed an act on petition, in which he alleged that he was one of the executors and residuary legatees of A., deceased, who was the lawful cousin-german of the deceased, and one of his next of kin, and living at his death.

Upon motion, the Court gave the plaintiff leave to amend the citation by inserting in it his correct description, upon payment of the defendants' costs up to the time of the amendment, exclusive of the costs of entering an appearance.

This was a suit for the revocation of probate of a will and codicil of Joseph Mayer, deceased, which had, on the 17th of December, 1860, been granted to the defendants as executors. In the affidavit to lead the citation, and in the citation, the plaintiff was described as "one of the lawful cousins and next of kin of the deceased." The defendants entered an appearance, and afterwards upon summons obtained an order that the plaintiff should propound his interest. In pursuance of the order he filed an act on petition, setting forth his interest, and alleging that he was one of the executors and residuary legatee of John Ridgway, deceased, who was the lawful cousin-german of the testator, and one of his next of kin, and living at the time of his death. The deceased had by his will directed all his residuary, real, and personal estate to be divided equally amongst his cousins-german, including the said John Ridgway, and by a clause in the codicil, his real estate was given to the defendants Abington and Wedgwood. The object of the suit was to set aside the codicil.

Dr. Tristram, on behalf of the plaintiff, now moved for

1862. leave to amend the citation by inserting the description of the
November 4. plaintiff, as set forth in the act on petition, instead of that
erroneously set forth in the citation. The defendants now
RIDGWAY admit that the plaintiff has an interest, though that interest
F. was not correctly stated in the citation; and according to the
ABINGTON practice of the Prerogative Court, leave to amend the citation
AND OTHERS. should be granted.

Dr. Spinks: At least the plaintiff must pay the defendants' costs occasioned by the mistake.

SIR C. CRESSWELL: What costs do you claim to be entitled to?

Dr. Spinks: All costs incurred up to the time when the plaintiff abandoned his original position, viz. the costs of appearance, of the summons to propound interest, of taking the advice of counsel, and of this motion. The defendants, now that the plaintiff has correctly set forth his interest, are ready to propound the will.

Dr. Tristram: The costs of entering an appearance should be costs in the cause. The appearance already entered may stand, for the defendants, before propounding the will, would have to appear.

SIR C. CRESSWELL: I think it is reasonable that the costs of entering an appearance should be costs in the cause, but the defendant is entitled to the other costs. Upon payment of these costs the citation may be amended. The appearance already entered will stand as an appearance to the citation when amended.

FOXWELL v. POOLE AND WIFE.

1862.

November 6.

FOXWELL
v.
POOLE AND
WIFE.

Practice.—Costs.—Instructions for Will not annexed to Affidavit of Scripts.

The omission to annex to, or mention in the affidavit of scripts, the instructions for a will, is no ground for allowing out of the estate the costs of an unsuccessful opposition to the will, if such opposition is not founded on the absence of instructions.

The plaintiffs, as executors of Thomas Townsend, late of Gloucester, deceased, propounded his will, bearing date the 2nd of April, 1859. The defendants, Mr. Poole and wife, the latter being the daughter of the deceased, and one of his next of kin, pleaded undue execution and incapacity, and subsequently gave notice that they did not intend to produce witnesses. The cause came on now for hearing before Sir C. Cresswell, when the due execution of the will and the capacity of the testator were established. The only point worthy of mention was as to costs. Mr. Clutterbuck, a solicitor of Gloucester, who had prepared the will, was called as a witness, and, in the course of his examination, he produced the instructions for the will, which he had written down at the dictation of the testator. These instructions had not been annexed to, nor were they referred to in the affidavit of scripts.

Dr. Spinks, on behalf of the defendants, submitted, that as the instructions for the will had not been annexed to or referred to by the affidavit of scripts, but had been kept back until the hearing, the defendants should be allowed their costs out of the estate.

Dr. Wambey (*Mr. Woollett* with him) *contra*: 'The instructions undoubtedly ought to have been annexed to the affidavit of scripts; but as the defendants' case was in no way affected by their non-production at an earlier date, they ought not to be

1862. allowed costs out of the estate. I do not ask that they be
November 6. condemned in costs.

FOXWELL

v.

POOLE AND
WIFE.

SIR C. CRESSWELL: Then I make no order as to costs. There is no doubt that the instructions ought to have been brought in; but the opposition to the will is not founded on the absence of instructions. If the defendants had opposed the will on the ground of fraud, undue influence, or that the will was not that of the deceased, there might have been something in Dr. Spinks's argument. Mr. Poole had abundant opportunity of knowing the facts, and there is no ground for the suggestion that the deceased was of unsound mind. I think, therefore, that he was not justified in placing such a plea on the record. But even if undue execution had only been pleaded, I should not, under the circumstances, have given the defendants their costs out of the estate. I pronounce for the will, but make no order as to costs.

Probate granted; no order as to costs.

November 11.

VAN STRAUBENZEE AND WIFE v. MONCK.

VAN
STRAUBENZEE
AND WIFE
v.
MONCK.

Duly Executed Paper.—Incorporation by Reference.

M. duly executed a paper with these words on it: "It is my wish for
"my dear husband to administer to the moneys; the smaller be-
"quests L. will be so kind as to attend to." She then, in the
presence of the attesting witnesses, enclosed in it two papers with
writing on them, and folded and sealed the first paper. After M.'s
death, the envelope was found to contain two sheets of paper, con-
taining bequests of money and other bequests in the handwriting
of M., but unexecuted. When found, it appeared that the envelope
had been opened and resealed; there was no evidence that the papers
found in it were those originally enclosed, or that they were in exis-
tence when the envelope was executed. No other testamentary
papers were found:

Handwritten
1 P n D 200

HELD, that the duly executed paper did not refer to any written document as then existing, and if it did so, that the document was not pointed out in such a manner as to enable the Court to ascertain its identity; that the three papers were not together entitled to probate, and that the duly executed paper, having by itself no testamentary character, was not entitled to probate.

1862.
November 11.
VAN
STRAUBENZEE
AND WIFE
v.
MONCK.

This was an amicable suit, instituted under the direction of the Court for the purpose of determining whether two paper-writings of a testamentary character had been incorporated in another paper-writing duly executed according to the Wills Act by the late Mary Elizabeth Monck, the wife of Sir Charles Miles L. Monck, of Belsay Castle, Northumberland, so as together to constitute her last will. It had been arranged that Mrs. Van Straubenzee should propound the papers as plaintiff in the suit, and that Sir Charles Monck should appear as defendant.

The personal property over which Lady Mary Monck had disposing power consisted of certain articles of paraphernalia, and she also had power, under her marriage-settlement, to appoint by will a sum of £5000 charged on her husband's estates, and to be raised and paid after his death.

The facts of the case, as proved by affidavit, were, that on the 6th of May, 1851, Fanny Brown, the housekeeper at Belsay Castle, was requested by Isabella Graham, now deceased, another servant at Belsay Castle, to accompany her to the room where Lady Mary Monck was sitting; that they accordingly went into the room and found her there alone, sitting at her writing-table, upon which were several papers lying before her, but how many the said Fanny Brown did not recollect; that Lady Mary Monck took from amongst the said papers the said paper marked A, and signed it in the presence of Fanny Brown and Isabella Graham, and requested them to sign their names to it as witnesses, which they thereupon did in her presence, and in the presence of one another. The following is a copy of exhibit A :—

1862.
November 11.
VAN
STRAUBENZEE
AND WIFE
v.
MONCK.

"It is my wish for my dear husband to administer to the moneys, the smaller bequests dear Laura will be so kind as to attend to.—M. E. MONCK, May 16th, 1851. Fanny Brown. Isabella Graham.

"Some tapestry work of the Dowager Countess of Tankerville to be disposed of as Sir Charles may think fit, or kept by the family at Belsay."

This last paragraph was not on the paper when signed by the witnesses. Immediately after the witnesses had subscribed their names, Lady Mary Monck took from among the papers lying on the writing-table two sheets of paper with writing on them (but Fanny Brown could not identify them), and enclosed them in the paper marked A, which she sealed with two seals. Some time after the year 1853, Lady Mary Monck gave to her husband exhibit A, sealed with two seals, impressed with the letter M, to deposit in the strong-room. This paper parcel was opened after her death, and was found to contain two pieces of paper, marked exhibits B and C. They commenced as follows:—

"Belsay, May 11, 1851.

"Of the £5000 in my power to leave, I bequeath to dear Harriet Straubensee, to be settled on my god-daughter Mary Straubensee, £1000; £2000 to Louisa and Alicia Hammond, £1000 each; £500 to Maria and Mary Wrottesley, £250 each; £1000 to Gertrude Gorges, to be settled on her son Arthur."

Then followed a great number of bequests of articles of jewellery and pictures to various persons, including the bequest of turquoise and gold earrings, and concluded thus:—"Signed in the envelope, May 16th, 1861;" underneath this, and in a different-coloured ink, were these words: "P. S.—The water-coloured paintings in Duke Street, and whatever else of mine of worth and ornament, to my dear husband. My will revised, April 19th, 1858."

Several alterations in red ink had been made by the de-

ceased subsequent to the original date of the document, and it was clear from the state of the seal that the envelope had been opened after it had been sealed in the presence of the attesting witnesses.

The pleadings are sufficiently referred to in the judgment.

1862.
November 11.
—
VAN
STRAUBENZEE
AND WIFE
v.
MONCK.

Dr. Tristram, for the plaintiffs: The question raised in this suit is, whether Lady Mary Monck has died testate or intestate. Whatever be the result, Sir Charles Monck intends to carry out his wife's wishes as expressed in these exhibits A, B, and C, which are all in her handwriting. It is admitted on the other side that exhibit A was duly executed in accordance with the requirements of the Wills Act. Standing alone, it is not entitled to probate, as it disposes of no property; but there are two expressions in it which clearly refer to some testamentary dispositions made by the deceased. The words "my dear husband to administer to the moneys" must be taken to have reference to some moneys referred to in some other testamentary paper. The use of the word "bequests," where the deceased says, "the smaller bequests dear Laura will be so kind as to attend to," indicate that she had made *some* testamentary disposition in writing. The only papers to which she can have intended to refer are B and C, which must be taken to be incorporated in the exhibit A, for the following reasons:—1st. There are in existence testamentary papers of the nature of those referred to by exhibit A, viz. exhibits B and C. The moneys referred to in exhibit A may reasonably be assumed to be the £5000 which she appoints in exhibits B and C, and the "smaller bequests" would seem to point to the disposition of her jewellery, paintings, etc., also contained in those exhibits. 2ndly. There are in existence no other papers to which A could refer excepting B and C, and there is no evidence of the deceased ever having made any other testamentary papers except these. 3rdly. They may be identified by date. Exhibits B and C are headed "Belsay, May

1862. 11th, 1851," that is, five days prior to the execution of exhibit A. They, therefore, must have been in existence prior to the 16th of May; and at the end are these words, "Signed in the envelope, May 16th, 1851." Here is evidence in the deceased's own handwriting of these being the papers which were enclosed in the envelope. On looking at the ink, it will be seen that the greater part of these papers were written about the same time, and it is equally certain that some additions have been made since, as stated in the memorandum at the end. The case clearly comes within the doctrine laid down in *Allen v. Maddock*, 11 Moo. P. C. 426, so as to let in parol evidence to show that B and C are the papers referred to. There are several passages in that judgment bearing strongly on the propositions he had laid down [see pp. 453, 454, 455, 461, and 462].

November 11.
 VAN
 STRAUBENZEE
 AND WIFE
 v.
 MONCK.

SIR C. CRESSWELL: There is this difficulty you have to contend with amongst others—the envelope was certainly opened after it had been sealed. What is there to show that exhibits B and C were the two papers enclosed in it by Lady Mary Monck when she sealed it? If it had never been opened, it might have been contended that the envelope of necessity referred to those two papers, and the case would then have been somewhat similar to the case of *In the Goods of Almosnino*, 1 Swab. & Trist. 508.

Dr. Spinks, contra: If the argument used on the other side is to prevail, the main object of the Wills Act will be defeated. In order that a duly executed paper may incorporate another, there must be a reference to an existing instrument, in such terms as to render it capable of identification. In this case there is in paper A no distinct reference to any particular paper, and there is no sufficient evidence that B and C were in existence when A was executed. If the papers are entitled to probate, Sir Charles Monck is executor according to the tenor.

SIR C. CRESSWELL: Yes, I think if there is any occasion for probate, he would be entitled to it as executor according to the tenor.

Cur. adv. vult.

1862.

November 11.

VAN
STRAUBENZEE
AND WIFE
v.
MONCK.

SIR C. CRESSWELL: In this case Mr. Henry Van Straubenzee and his wife propounded the will of the late Lady Mary Elizabeth Monck, and alleged that in pursuance of the power contained in her marriage-settlement, and of every other authority enabling her in that behalf, she made her last will and testament, dated the 16th of May, 1851, in manner following:—that two persons having by her previous request come into the room where she was then sitting, she signed her name to a paper-writing which was then on a table before her, containing the words following: “It is my wish for my dear husband to administer the moneys; the smaller bequests dear Laura will be so kind as to attend to,” in the presence of the said two persons as witnesses, who duly attested the same; and that the said deceased then, in the presence of the said two witnesses, placed two sheets of paper with writing thereon, and which were lying on the said table before the testatrix, within the first-mentioned paper-writing; and that she then, in their presence, folded up the said first-mentioned paper with the two sheets of paper within it, and sealed the same; and that the first-mentioned paper is exhibit A, and that the two others are exhibits B and C, and that the exhibits A, B, and C contain together the last will and testament of the deceased. The defendant, in his answer, admits the due execution of exhibit A, and that the deceased in the presence of the two attesting witnesses placed two sheets of paper with writing thereon, and which were then lying on the table before her, within exhibit A; but denies that the said two sheets of paper are the same as the two sheets of paper marked exhibits B and C, and denies that the exhibits A, B, and C together contained the last will and testament of the deceased.

1862. Jose Ferreira Veiga, late of Lisbon, deceased, died on the November 11. 7th of June, 1846, having made a will, wherein he named executors in the words following:—"I appoint for my executor, in the City of Lisbon, whither I am about to proceed, my cousin, Joaquim Jose da Castra Ferreira, and I also appoint him guardian of all my sons and daughters, both by my first and my second marriages. In default of my aforesaid cousin, I appoint as executors Messieurs Bento Jose Cardozo and Domingos Manoel Etneo Continho, jointly; in default of those, I appoint as executors Messieurs Custodio Jose Ferreira Bragua and Joaquim Antonio de Moraes Carniero, jointly."

In the Goods of
JOAQUIM JOSE
FERREIRA
VEIGA.

The testator was possessed, at the time of his death, of £160,000 Three per cent. Consols, and other personal property in England.

On October the 6th, 1846, probate of this will was granted by the Prerogative Court to Mr. Ferreira (4 Notes of Cases, 698), who died in August, 1849, leaving the money in the Consols unadministered. By the law of Portugal the executorship, on the death of Mr. Ferreira, devolved upon Cardozo and Continho. On the 27th of August, 1849, Continho executed an act of desistance from the executorship at the bureau of the Administrator of the upper district of Lisbon, and Cardozo, by his attorney, signed an act of acceptance of the executorship, and entered upon the duties of the same in Portugal. The Prerogative Court accordingly, on the 17th of January, 1850, decreed probate of the will, on motion, to Cardozo (7 Notes of Cases, sup. 48).

Mr. Cardozo died on the 8th of February, 1855, leaving a large portion of the deceased's estate in England unadministered. By the law of Portugal the executorship then devolved upon Bragua and Carniero, with whom the Court of Lisbon associated the widow of the deceased, Joana Veiga, as executrix. On the 16th of February, 1856, the Prerogative Court was moved to decree letters of administration *de bonis non*,

with the will annexed, to Carniero and the widow Veiga 1862.
(Bragua having desisted from the executorship), they being November 11.
the parties upon whom, by the law of Portugal, the adminis-
tration of the estate of the deceased had now devolved.

In the Goods of
JOAQUIM JOSE
FERREIRA
VEIGA.

The Court rejected the motion, and on the 9th of June, 1856, granted administration with the will annexed to Carniero alone.

Joana Veiga had since died, and Carniero being unable, from the state of his health, to continue to act in the execution of the will, had in conformity to the laws of Portugal renounced the function of executor, and the administrator of the district had nominated as executor, for all legal purposes, Jose Antonio Ferreira Vianna the younger, who had signed a deed of acceptance of the same.

Dr. Wambey moved the Court to decree letters of administration with the will annexed of the unadministered effects of the deceased to be granted to the said Jose Antonio Ferreira Vianna the younger.

SIR C. CRESSWELL: There is an executor now living, to whom a grant was made by the Prerogative Court; has this Court ever recognised the renunciation by an executor after he has taken probate of the will?

Dr. Wambey: No; but it has been the practice of this Court to follow the grant made by the Court of the place where the testator was domiciled (*In the Goods of the Countess da Cunha*, 1 Hagg. 240).¹

SIR C. CRESSWELL: I should have no hesitation in following the practice of the Portuguese Court, and making a grant to their nominee, if there had not been a grant by an English Court in existence. How can I get rid of the administration

¹ But see *In the Goods of the Duchess of Orleans*, 1 Swab. & Trist. 253.

1862. with the will annexed granted in 1856? I think that, unless
 November 11. you can find some authority for saying that I can follow the
 In the Goods of practice of a foreign Court in allowing an executor, who has
 JOAQUIM JOSE already taken the grant, to renounce, I must reject your
 FERREIRA motion.
 VEIGA. *Motion rejected.*

In the Goods of LUIGI BIANCHI (deceased).

November 25.

Administration.—Revocation of Grant.—Domicil.—New Grant.

In the Goods of
 LUIGI
 BIANCHI.

A Sardinian, who had settled in Brazil, died intestate on his voyage from Bahia to Genoa. He had wound up his affairs in Brazil, and intended to resume his domicile of origin at Genoa. An agreement had been come to between the Brazilian and Italian Governments, with respect to the administration of his property and the guardianship of his children (some of whom were in Genoa and others in Brazil), by which the Brazilian Government gave up to the Italian Government all claim to such administration and guardianship.

The Court revoked a grant of administration which had been made to the representative of the person entitled to it according to the Brazilian law, and made a grant to the person entitled to it according to the Italian law.

Luigi Bianchi, a Genoese by birth, went to Bahia, in the empire of Brazil, and acquired a considerable fortune. He had a wife and seven children. He sent three of his children to Genoa for their education. In 1856, having wound-up his affairs at Bahia, he sailed from that place with his wife and four children, intending to return to Genoa, and to reside there permanently, and he died on the voyage at Teneriffe intestate. His relatives at Genoa, hearing of his death and not knowing what had become of his wife and the four children, held a family council, and appointed Francesco Cavnaguardo guardian of the three children. After the death of the deceased his widow went back to Brazil with the four

children, and there married a Brazilian ; after which, Lorenzo de Souza Marques was appointed guardian of the children in Brazil. In 1859 an application was made to this Court by the duly substituted attorney of Marques for a grant of administration of the effects of the deceased in this country, amounting to about £4000, and the grant was made.¹

1862.

November 25.

In the Goods of
LUIGI
BIANCHI.

Discussions took place between the Governments of Sardinia and Brazil with respect to the domicile of the deceased at the time of his death, which ended in an agreement being come to between the two Governments that the administration of the estate in Brazil, and the guardianship of the children there, should be placed in the hands of the Italian consul at Bahia.

Dr. Deane, Q.C., moved that the grant to the attorney of Marques might be rescinded, and a grant made to Cavagnaro.

SIR C. CRESSWELL: What is the arrangement between the Courts of Turin and Brazil? If the deceased was domiciled in Brazil at the time of his death, how can such an arrangement affect the grant to be made by me?

Dr. Deane: The Brazilian Government have surrendered all their interest in the matter to the Italian Government. The arrangement is stated in the dispatches of the chargé d'affaires of the King of Italy at Rio Janeiro, and of the chargé d'affaires of the Emperor of Brazil at Turin. The Brazilian chargé d'affaires states that, in consequence of an agreement between the two Governments, the property of the deceased in Brazil, and the minor children in that country, are to be placed under the charge of the Italian consul at Bahia. A decree of the Court at Turin, of March, 1862, de-

¹ Sw. & Tr. 511. It is stated in the report that the deceased, at the time of his death, was on his way to Europe "for a temporary visit."

1862. clares that the domicil of the minors is Italian and not Bra-
November 25. zilian, and that Cavagnaro is their guardian.

In the Goods of
LUIGI
BIANCHI.

SIR C. CRESSWELL: The deceased was originally domiciled in Genoa; he then became domiciled in the Brazils, and there is no doubt of the fact that he died *in itinere*, as he was returning to Genoa to resume his permanent residence there. Then it may be said that, as soon as he had finally abandoned the acquired domicil by setting off on his journey to return to his domicil of origin, the latter revived.

Dr. Deane: That would be so here.

SIR C. CRESSWELL: It seems to me that under the circumstances you are entitled to the grant.

Motion granted as prayed.

December 2.

In the Goods of KLINGEMANN (deceased).

In the Goods of
KLINGEMANN.

Foreign Law.—Ambassador's Certificate.—Practice.

The certificate of the Hanoverian ambassador, under the seal of the Legation, was admitted as evidence of the law of Hanover as to the validity of a testamentary paper.

Dr. Wambey moved for a grant of administration with a testamentary paper, described as a codicil, annexed, of the estate and effects of George Carl Christoph Conrad Klingemann, otherwise Carl Klingemann, or otherwise Charles Klingemann, deceased, to Sophie Louise Klingemann, his lawful widow, and the universal legatee for life named in the said codicil, limited until the original will of the deceased should be discovered and brought into the registry. Carl

Klingemann, late of 4, Hobart Place, Eaton Square, in the county of Middlesex, died on the 25th of September, 1862, at 4, Hobart Place. He was the secretary to the Royal Hanoverian Legation in London, and had held that office for thirty years previous to his death. A testamentary paper, written in the German language, was found after his death, commencing thus:—"By way of codicil to my last will and testament, deposited at the Royal Hanoverian Legation here, and by way of addition and completion to the same, I desire and determine as follows." The paper then proceeded to make a disposition of the whole of the deceased's property, and to appoint executors. It was dated the 12th of August, 1859, and was duly executed in London, and attested in accordance with the law of England. Search had been made and advertisements inserted in the 'Times' newspaper, but no other testamentary paper could be found. The executors had renounced. The deceased was a domiciled Hanoverian at the time of his death, and Count Kilmansegge, envoy extraordinary and minister plenipotentiary from the King of Hanover, had signed a certificate that "a will, codicil, or testamentary paper, made and executed in accordance with the law of England, is a valid will, codicil, or testamentary paper by the law of Hanover." This certificate was under the seal of the Legation, and had been filed. *The Goods of Anne Dormoy*, 3 Hagg. 767, is an authority that such a certificate was sufficient evidence of foreign law.

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December 2.

In the Goods of
KLINGEMANN.

The COURT granted the motion.

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December 2.

In the Goods of **PETER RICHMOND WYCKOFF** (deceased).

In the Goods of
PETER
RICHMOND
WYCKOFF.

Foreigner.—Goods within Jurisdiction of Court.—Administration ad Colligendum.—73rd Section of Probate Act.

A foreigner, inhabiting the State of Alabama in North America, died on board a British ship on his voyage to England, possessed of property, chiefly bills of exchange drawn on merchants in Liverpool, and entitled to a sum of money alleged to be in the hands of another person in this country. On the arrival of the ship in the port of London, the owner took possession of the bills of exchange; and there being no known relation or agent of the deceased in this country, and communication with his relations in the Southern States of North America being difficult and uncertain by reason of the civil war and blockade of the southern ports, the Court granted administration to the owner of the ship, limited to realize and collect the property which the deceased was possessed of or entitled to within the jurisdiction of the Court, and to invest the proceeds in Three per Cent. Consols; the sureties to justify:

The Court intimated that for the future it would be better that the Queen's Proctor should interpose in such cases for the protection of the property.

This was an application for letters of administration *ad colligendum bona*.

The affidavit of Saul Isaac, the applicant, stated that the deceased Wyckoff, late of Mobile in the State of Alabama in North America, sailed on or before the 1st of August, 1862, from Nassau, on board the steamship 'Melita,' owned by the deponent's firm, for the port of London. That Wyckoff died on board the 'Melita' before she reached England. That at the time of his death he had about him on board the 'Melita' four bills of exchange, drawn at Mobile on merchants in Liverpool, indorsed to his order, together amounting to £680; gold, cash, and other personal property, to the value of £14, which bills and cash had come into the hands of Messrs. Isaac as owners of the ship. That it was believed that a further sum of £379, belonging to the deceased, was in the hands of

Mr. Brewer. That the passage-money of the deceased, £31 10s. for the voyage, was still due and owing to the Messrs. Isaac, and that they had no security for the debt. That the deponent had no reason to believe that the deceased had any relations, or any attorney or agent in England. That owing to the unsettled state of affairs in North America, and the blockade of the southern ports thereof, there was great difficulty and uncertainty in communicating with such relatives of the deceased as were resident in the said Southern States. That it was desirable that no greater delay should take place in presenting the said bills of exchange, and in obtaining payment of the sum of £379, and that there should be a legal personal representative of the deceased in this country to give proper discharges to the person who may accept and be prepared to meet the said bills, and pay the said sum.

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In the Goods of
 PETER
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The Queen's Advocate (Sir R. Phillimore) (*Dr. Swabey* with him) moved the Court to decree letters of administration to Mr. Saul Isaac, limited to the property of the deceased hereinbefore mentioned, with power to reimburse his firm the money due to them from the deceased for his passage by the 'Melita,' and to invest the balance in Government securities till a general administration should be legally obtained. They cited *In the Goods of Mary Radnall*, 2 Add. 232; and *In the Goods of Don Miguel Gudolle*, T. T. 1835, mentioned in Coote's Common Form Pract. 123, 4th edition.

BY THE COURT: Is not the case of *Aspinall v. The Queen's Proctor*, 2 Curt. 241, against the application? Ought not the Queen's Proctor at least to have had notice in such a case? My impression is that, in such cases, the Queen's Proctor, on the part of the Crown, is the proper person to interfere.

Sir R. Phillimore: In *Aspinall v. The Queen's Proctor*, the

1862. Consul-General of the United States of North America claimed
 December 2. a general right to administer to the effects of United States' citizens dying intestate in this country, *in itinere*, limited for certain purposes. Such a right was opposed on behalf of the Crown, and the Court decided against the claim; but it does not appear from the report that the Crown either claimed or took the grant.

In the Goods of
 PETER
 RICHMOND
 WICKOFF.

SIR C. CRESSWELL: The papers in the case of *Gudolle* shall be looked up in the registry, and I will consider the whole case.

Cur. adv. vult.

From the minute in the registry of the grant *In the Goods of Gudolle* (date July, 1835), the facts alleged appear to have been as follows:—

Don Miguel Gudolle, of the State of Peru, in South America, intending a voyage to England, enclosed in a letter, dated Cadiz, March 31st, 1835, to Thomas Stooks, six bills of exchange, drawn on merchants in London, indorsed by himself to the firm of Elmslie and Stooks, of which firm Thomas Stooks was the surviving partner; such bills amounting to £1932 odd. In the letter, the deceased stated it to be his intention to proceed to London in the month of April, where he arrived on or about the 6th of May, and died suddenly, on the following day, at the Bell and Crown Inn, Holborn. After his death, six other bills of exchange, drawn on persons in London, to the amount of £2250 odd, were found to have been in deceased's possession, of all of which Thomas Stooks took charge, and procured them to be accepted by the several persons on whom the same were drawn; and at the time of the application these bills remained in his custody. It was stated that no will or testamentary paper of the deceased was then or had since been found; that he died a bachelor and intestate, without a father, leaving behind him his mother and several brothers, resident in Peru. Thomas Stooks had

paid the sum of £100, or thereabouts, for funeral and other expenses of the deceased in this country. It was stated to be necessary, for the preservation of the estate, that letters of administration should be granted without waiting to hear from the next of kin or others who might be entitled to deceased's property.

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In the Goods of
PETER
RICHMOND
WYCKOFF.

On the 30th of May, 1835, after reading the affidavits and hearing counsel thereon, the Surrogate¹ decreed letters of administration to Thomas Stooks, limited to receive the sums due and to become due on the last-mentioned bills of exchange; and after reimbursing himself the sum of £100, or thereabouts, and paying the expenses of obtaining administration, to invest the balance, and also the sum of £1932 in his own name in Government securities, and to keep the same so invested until letters of administration of the goods of the deceased should be granted according to law, on exhibiting an inventory and securities justifying.

In this case a fresh administration was granted in August, 1836.

The Queen's Advocate stated that he had conferred with the Queen's Proctor on the circumstances of this case, and that it did not seem one in which it was necessary that the Crown should interfere; but if the Court intimated its wish that in future such cases should be dealt with by the Queen's Proctor, he would of course be ready to interpose.

December 9.

SIR C. CRESSWELL: The case of *Gudolle* is not a precedent for the present application. There the deceased had

¹ Stated in the minute-book to have been the Right Hon. Sir John Nicholl, Knight, Doctor of Laws, Surrogate of the Right Hon. Sir Herbert Jenner, Knight, Doctor of Laws, Master, etc., of the Prerogative Court of Canterbury. Sir John Nicholl resigned the Deanery of the Arches and the Judgeship of the Prerogative Court of Canterbury in October, 1834, but continued to hold the Judgeship of the Admiralty Court till September, 1838.

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written to the firm, one of the partners of which applied for the grant, sending bills of exchange indorsed to them, and stating his intention with respect to visiting London, thereby investing them with the character of his correspondents or agents. In the present case, no such connection subsists between the deceased and the party applying; there is nothing more than the accident of his death on board a ship owned by them. It is no doubt of importance that the property of the deceased in this country should be protected; and after what has been to-day stated by the Queen's Advocate, I will, under the authority of the 73rd section of the Probate Act, make the grant to his client, limited for the purpose of realizing and collecting the property which the deceased died possessed of or entitled to within the jurisdiction of the Court, and to invest the proceeds of such property in the Three per Cent. Consols, till an ordinary representation shall have been legally obtained, but no further or otherwise. In similar cases I think the better course for the future would be, that the Queen's Proctor should interpose for the protection of the property till the parties entitled come forward. The securities must justify.¹

¹ Query, whether in practice the Crown has hitherto interfered, except where beneficially interested? In Toller's Law of Executors and Administrators, 2nd edition, p. 107, it said: "The Ordinary, also, in default of persons entitled to the administration, may grant letters *ad colligenda bona defuncti*, and thereby take the goods of the deceased into his own hands, and thus assume the office of executor or administrator in respect to the collecting of them; but the grantee of such letters cannot sell the effects without making himself an executor *de son tort*. The Ordinary has no such authority, and therefore he cannot confer it on another."

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June 17.

SANDREY *v.* MICHELL AND ANOTHER.

In the Goods of EDWARD BAWDEN (deceased).

SANDREY

v.

MICHELL AND

ANOTHER.

In the Goods of

EDWARD

BAWDEN.

Administration Bond.—Condition for Payment of Debts.—
Order to Assign.—Probate Act, Sections of, 81 & 83.—
Practice.

When a person makes out a *prima facie* case that there has been a breach of the condition of an administration bond, the Court will direct it to be assigned by the Registrar.

The Court will not entertain objections to the validity of the condition of the bond, but will leave such question to be determined by a court of common law.

Edward Bawden died on the 12th of July, 1860, a bachelor, without parents, and intestate; whereupon administration of his effects was granted by the District Registrar of Bodmin to his brother, John Bawden (since deceased), who gave an administration bond, with the defendants as sureties, to the Judge of the Court of Probate, in the sum of £900. The bond and condition was in the form annexed to the Rules and Orders of the Court of Probate in non-contentious business; the condition being, that if he do exhibit, or cause to be exhibited, a true and perfect inventory of the effects of the deceased into the District Registry of Bodmin, whenever required by law so to do, “and the personal estate and “effects of the said deceased which at any time after shall “come to the hands or possession of the said John Bawden, “do well and truly administer according to law; that is to “say, do pay the debts which he did owe at his decease, and “further do make, or cause to be made, a true and just account “of his administration whenever required by law so to do, “and all the rest and residue of the said personal estate and “effects, do deliver and pay unto such person or persons as “shall be entitled thereto, under an Act of Parliament inti-

1862. "tuled ' An Act for the better Settling of Intestate Estates,'
June 17. "etc.," then the bond to be void.

SANDREY
v.
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ANOTHER.
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The plaintiff had filed an affidavit, stating that there was due to him from the deceased at the time of his death the sum of £36. 18s.; that he brought an action for it against John Bawden as administrator, and that he had allowed judgment to go by default; that he afterwards issued a *fi. fa.* against the goods of John Bawden, and that the sheriff had made a return of *nulla bona*; that John Bawden had since died, and that he believed that assets had come into his hands, out of which he might and ought to have paid the debt. A citation had been issued, at the instance of the plaintiff, against the defendants, calling upon them to show cause why the bond should not be assigned to the plaintiff for the purpose of putting it in suit against them.

The defendants had filed an act on petition, alleging—(1) that the plaintiff had not cited the administrator to bring in an inventory in his lifetime, as he might have done; (2) that the non-payment of debts was not a condition for the breach of which an action was maintainable at common law.

Mr. Aspland moved the Court to order the Registrar to assign the bond to the plaintiff, on the ground that there had been a breach of one of its conditions. The bond was expressly conditioned for the payment of debts, and even if it were not the intention of the Legislature, in the 81st section of the Probate Act, that this condition should have been inserted in it, it was not competent to the defendants, having executed the bond with this condition in it, now to repudiate it. He submitted that the old cases of *Brown v. The Archbishop of Canterbury*,¹ and *The Archbishop of Canterbury v. Robertson*,² would not apply to a bond given under the Probate Act.

Dr. Tristram, contra: It is not compulsory on this Court

¹ 1 Lut. 882.

² 1 Cr. & Mees. 690.

to order the bond to be assigned, any more than it was on the Judge of the Prerogative Court to order it to be attended with for the purpose of its being sued upon at common law. The words of the 83rd section of the Probate Act are, "that the Court *may*, on application being made, and on being satisfied that the condition of the bond has been broken, order it to be assigned," etc. There are two objections to the Court making the order in this case:—

1st. The plaintiff did not cite John Bawden, which he might and ought to have done, in his lifetime (*Crowley and Charmau v. Chipp and Tubb*, 1 Curt. 461); and until an inventory and an account is brought in, there is no *constat* of there being assets to pay the plaintiff's debt (*Murray and Maling v. M'Inerheny and Impey*, 1 Curt. 579). 2ndly. The non-payment of debts is not a condition for the breach of which an action is maintainable at common law. It must have been by an oversight that this condition was inserted in the new forms. By the 81st section of the Probate Act, the Judge is directed to require a bond conditioned for duly collecting, getting in, and *administering the personal estate of the deceased*, which bond was to be in such form as the Judge shall direct; but he is not thereby authorized to insert a condition for the payment of debts. The words "duly administering the personal estate of the deceased," cannot be construed to extend to the payment of debts. It was so decided in the case of *The Archbishop of Canterbury v. Robertson*, and in the cases there referred to, in construing the condition "*truly to administer according to law*," as contained in the form of bond prescribed by 22 & 23 Car. II. cap. 10, s. 2. If the Legislature had intended to put a different interpretation on the words "duly administer" in the Probate Act, to what their equivalents were held to signify in the Act of Charles II., it would have clearly expressed such intention. And there is nothing whatever to show that it was the intention of the Probate Act to give creditors of the estate of intestates greater security for the payment of their debts than they had before.

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SIR C. CRESSWELL: I doubt very much whether I ought to have allowed you to raise these questions before me. The 83rd section of the Probate Act authorizes me to order the bond to be assigned on being satisfied that the condition has been broken. I incline to think that all that is required to authorize me to assign the bond is that the party applying for it to be assigned shall make out a *prima facie* case that the condition has been broken. I will not decide as to the validity or invalidity of the condition for the payment of debts. I will leave that question to be decided by a court of common law. I direct the bond to be assigned.

[The plaintiff subsequently sued the defendants on the bond in the Queen's Bench, alleging a *devastavit*. The defendants demurred to his declaration, and the Court gave judgment for the defendants, with leave to plaintiff to amend on payment of costs. The plaintiff has abandoned the action. 32 L. J. Q. B. 100.]

December 16.

In the Goods of WILLIAM JONES (deceased).

In the Goods of WILLIAM JONES. *Administration Bond.—Breach of Condition.—Rule Nisi on Sureties to show cause why it should not be assigned.—*

Probate Act, 1857, s. 83.

Where a person interested under the estate of a deceased intestate, to whom administration has been taken out, makes out a *prima facie* case of breach of the administration bond, the Court will direct a rule *nisi*, calling on the sureties to show cause why the bond should not be assigned.

William Jones, late of the parish of Caron, in the county of Cardigan, died on the 10th of April, 1853, intestate, leaving Margaret Jones, his widow, and five children him surviving. On the 4th of July, 1853, letters of administration of his effects were granted, by the Consistory Court at Car-

marthen, to his widow, who, with John Jones and Thomas Jones, her sureties, executed the administration bond. Mary Jones, one of the deceased's children, married Thomas Williams, and died on the 2nd of August, 1857, in the lifetime of her husband; to whom, on the 3rd of August, 1859, letters of administration of his wife's effects were granted. On the 16th of August, 1859, a summons was issued out of the Court of Chancery, calling upon Margaret Jones to show cause why an order for the administration of the personal estate of the deceased should not be granted. The defendant appeared, and on the 16th of November, 1859, an order was made by Vice-Chancellor Wood, directing, *inter alia*, that an account of the debts and funeral expenses of the deceased should be taken, and that an inquiry should be made as to what parts (if any) of the personal estate of the deceased were outstanding and undisposed of. On the 5th of November, 1861, the chief clerk certified that there was a balance of £777. 6s. 4d. due from Margaret Jones, as administratrix, after payment of debts and funeral expenses. On the 21st of November, 1861, an order was made by the Vice-Chancellor that Margaret Jones should, on or before the 10th of December, 1861, or within four days of the service of the order, after the 10th of December, pay into the bank, with the privity of the Accountant-General of the Court of Chancery, to the credit of the cause, £305. 17s. 9d., part of the sum of £458. 16s. 7d., the amount admitted by the said account to be due from her to the estate. This order was duly served on the 13th of December, 1861, on Margaret Jones. Default was made in payment, and a writ of attachment, and subsequently a writ of sequestration, issued against the said Margaret Jones, to enforce the performance of the said order. On the 29th of January, 1862, Margaret Jones was adjudicated a bankrupt by the Bristol Court of Bankruptcy. On the 14th of February, 1862, Thomas Williams was admitted to prove against the estate for the said sum of £305. 17s. 9d., and

1862.

December 16.

In the Goods of
WILLIAM
JONES.

1862. was chosen creditor's assignee. There was no estate under
 December 16. the bankruptcy, nor was there any property of Margaret
 In the Goods of JONES. Jones to make good the said sum of £777. 6s. 4d., or any
 WILLIAM part thereof. On the 24th of June, 1862, Margaret Jones
 JONES. obtained her order of discharge under the Bankruptcy Act.
 On the 12th of May, 1862, the Vice-Chancellor ordered that
 Thomas Williams, the plaintiff, should be at liberty to carry
 on the said cause against Margaret Jones notwithstanding the
 bankruptcy. The share of the said Thomas Williams, as ad-
 ministrator of his late wife in the personal estate of the de-
 ceased, remained unpaid, and there was no fund out of which
 the same might be paid other than what might be recovered
 from the sureties to the administration bond. The other
 children of the deceased were duly served with a notice of the
 order of the 16th of November, 1859, but neither of them
 applied to attend the proceeding thereunder. On the 4th of
 December, 1862, by an order of the Vice-Chancellor made in
 the cause, it was directed that Thomas Williams should be at
 liberty forthwith to take such proceedings as might be advised
 against Margaret Jones, and against the sureties to the adminis-
 tration bond, for the purpose of putting in force the said bond.

Dr. Spinks, on behalf of Thomas Williams, now moved the
 Court for a rule *nisi* calling upon John Jones and Thomas
 Jones, sureties to the administration bond, to show cause why
 the Court should not order one of the registrars to assign the
 said bond to the said Thomas Williams.

SIR C. CRESSWELL: This is a proceeding which seems to
 have fallen into disuse in the Prerogative Court. In the only
 two or three cases which I have been able to find, it appears
 that a monition was issued to the sureties, calling upon them
 to appear and show cause why the bond should not be as-
 signed. In a recent case, I granted an application for leave
 to issue a citation, calling upon the sureties to show cause
 why the bond should not be assigned.

Dr. Spinks : The practice of the Prerogative Court was to cite the sureties to show cause why the bond should not be delivered out. The 83rd section of the Probate Act, 1857, enacts, that, "The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond." Upon considering the best mode of amalgamating the old practice with that provided by the statute, it seemed to me that the Legislature clearly intended to abolish the unnecessary and cumbersome proceeding of issuing a citation, which would introduce a cause, and that the proper course to take under the statute is to make an *ex parte* application for a rule *nisi*, calling upon the sureties to show cause why the bond should not be assigned. By adopting that course, the same justice will be done to the sureties as by the practice of the Prerogative Court, as they will have an opportunity of showing cause why the bond should not be assigned; and, on the other hand, the next of kin will not be put to the inconvenience of instituting a suit, which would be the effect of issuing a citation. This seems to be the method adopted in the Irish Court of Probate. (*Morin*, deceased, and *Collins*, deceased, 7 L. T. Rep. N. S. 260.)

1862.
December 16.
In the Goods of
WILLIAM
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SIR C. CRESSWELL : You may certainly take a rule *nisi*; that will satisfy all that is required. That is the practice of the Irish Court of Probate. My only doubt was whether I was bound to require so much, or whether I ought not to

1862. have been satisfied with a *prima facie* case. The expression
 December 16. used in the statute, "that the Court may, on being satisfied
 In the Goods of "that the condition of any such bond has been broken," etc., is
 WILLIAM similar to that in the provision of the Common Law Proce-
 JONES. dure Act, 1852, ss. 18 and 19, under which proceedings may be
 taken against persons resident abroad, by leave of a judge,
 upon his being satisfied, by affidavit, that there is a cause of ac-
 tion which arose within the jurisdiction, or in respect of the
 breach of a contract made within a jurisdiction. The applica-
 tion to a judge under that provision is strictly *ex parte*. I
 think, however, that it is better to have a rule *nisi*. Take a
 rule *nisi*, to be served upon the sureties, returnable on the
 first motion day next term. The rule need not be served
 upon the administratrix.

BAKER AND MARSHMAN v. BROOKS.

November 25.
 And

MARSHMAN v. HUGHES.

1863.
 January 20.

*Administration Bond.—Breach of Condition.—Citation on
 Surety to show cause against Bond being assigned.—Pro-
 bate Act, 1857, s. 83.*

BAKER AND
 MARSHMAN
 v.
 BROOKS.
 MARSHMAN
 v.
 HUGHES.

On a *prima facie* case of breach of administration bond being esta-
 blished, notice in some form having been given to the sureties, the
 Court will direct the bond to be assigned; but might refuse to do so
 if on cause shown the proceeding appeared to be wholly frivolous
 and vexatious.

Richard Baker, late of Birmingham, dealer in umbrellas
 and furniture, died on the 11th of November, 1858, intestate.
 Letters of administration of his effects were granted to Sarah
 Baker, his widow, who, with John Hughes and Joseph
 Taylor, her sureties, executed the usual administration bond,
 the penalty being £400.

On the 22nd of November, 1859, a citation was extracted by Sarah Baker (since dead), the mother of the deceased, and Ann Marshman, the plaintiff, his sister of the half-blood, two of the persons entitled in distribution, calling upon Sarah Baker, the administratrix, to bring into the registry an inventory and account. The administratrix not appearing to the citation, on the 15th of February, 1860, an attachment issued, under which she was arrested and imprisoned in the county gaol for Warwickshire. She afterwards filed an inventory and account, and on the 26th of April, 1860, applied to this Court for her discharge from prison; but the Court being of opinion that the inventory and account filed were not satisfactory, the application was rejected, and she was directed to amend them. She neither amended the inventory and account nor filed others, but subsequently renewed her application to be discharged from prison, and it was again rejected. It appeared from the inventory filed that the stock-in-trade and other effects of the deceased, valued at £431. 11s. 6d., were sold by the administratrix to John Hughes, one of the sureties to the bond, for £100, subject to the payment of the trade debts and liabilities of the deceased, which amounted to £331. 11s. 6d. It appeared from an affidavit of John Hughes, that he had sold off part of the stock-in-trade, and had resold the plant and tools for £435. 4s. 6d. It also appeared that book-debts owing to the deceased had been received by the administratrix and by John Hughes, and that no account of these receipts had been given. The administratrix had since remarried, and was now Sarah Brooks.

1862.

November 25.

And

1863.

January 20.

BAKER AND
MARSHMAN

v.

BROOKS.
MARSHMAN

v.

HUGHES.

Mr. E. Ward, on behalf of the plaintiff, moved the Court, under the 83rd section of 20 & 21 Vict. c. 77, to direct that one of the registrars should assign the administration bond to Ann Marshman, the plaintiff, in order that it might be put in suit against John Hughes, one of the sureties, or that a citation should issue, calling upon John Hughes to show cause

1862. why the bond should not be so assigned for the purpose afore-
 November 25. said. The motion is in the alternative ; but I only ask for the
 And citation calling upon John Hughes to show cause why the
 1863. bond should not be assigned. The affidavits show breaches of
 January 20. the condition of the bond, for it appears from them that the
 ——— administratrix has not exhibited a true and perfect inventory,
 BAKER AND though required to do so, and also that she has been guilty of
 MARSHMAN a *devastavit*.
 v.
 BROOKS.
 MARSHMAN
 v.
 HUGHES.

SIR C. CRESSWELL directed a citation to issue to the surety Hughes, calling on him to show cause why the bond should not be assigned.

January 20. *Mr. E. Ward* moved that the bond be assigned. Notice of motion had been given to the surety on whom the citation had issued.

Dr. Spinks, for the surety cited, submitted that the plaintiff had mistaken his way ; that the surety was not, in the first instance, liable to an action, but to an administration suit in Chancery.

SIR C. CRESSWELL : The administratrix has not furnished such an inventory and account as the Court called for : that was part of the condition of the bond ; if that is broken, must not the bond be assigned ? I had some doubt, under the terms of the statute, whether I ought to have called the surety before the Court ; all that the Court really does by assigning the bond is to put the plaintiff in the position of a person who has a right to sue. Now that the surety is before the Court, I think I am bound to assign the bond, if a *prima facie* case of a breach of it is made out, as there is in this case. On the other hand, I will not say that if, on cause shown, the proceeding appeared to be clearly frivolous and vexatious, I would assign the bond.

SUMMERELL v. CLEMENTS.

1862.

December 6.

SUMMERELL

v.

CLEMENTS.

*Costs.—Unsuccessful Opposition to Will by next of Kin.—
Rule as to Condemnation in Costs.*

A party entitled to oppose a Will, who avails himself of Rule 41, contentious business, will never be liable to condemnation in costs. If a party calls witnesses in support of the pleas of undue execution and incapacity, and fails, his condemnation in costs will be in the discretion of the Court on all the circumstances of the case.

Failure to establish pleas of undue influence and fraud will, as a general rule, be followed by condemnation in costs.

The plaintiff propounded a will, dated the 9th of April, 1860, of William Clements, late of Bristol. The defendant, one of the sons of the deceased, pleaded undue execution and incapacity. The issues came on for trial before Sir C. Cresswell and a common jury.

Mr. Montagu Smith, Q.C., and Dr. Spinks, for the plaintiff.

Mr. Collier, Q.C., Mr. Henry James, and Mr. G. Brown, for the defendant.

Witnesses were examined on both sides, and the jury found a verdict for the plaintiff.

The COURT pronounced for the will.

Mr. Collier moved for costs out of the estate.

Dr. Spinks moved that the defendant be condemned in costs. The personal property was very small, and if the costs were not paid by the defendant, they must come out of the pocket of the plaintiff.

1862. SIR C. CRESSWELL: I cannot depart from the general rule
December 6. I have laid down as to costs.

SUMMERELL

v.
CLEMENTS.

Dr. Spinks: The rule, as I understand it, is, that where next of kin only raise the questions of due execution and capacity by the pleadings, and give notice that they will not produce witnesses, they are not liable to condemnation in costs. That was also the rule in the Ecclesiastical Courts. But where next of kin do not take that course, but compel the executors to go to the expense of contesting a case, the rule is that they must be condemned in costs.

SIR C. CRESSWELL: I never laid down the rule as broadly as that. I believe I have gone a good deal beyond the Prerogative Court in condemning costs, where the opposition has been unsuccessful, but I do not think I have gone so far as you state.

Dr. Spinks: By the practice of the Prerogative Court, the defendants in this case would have been condemned in costs. They have gone beyond the cross-examination of the plaintiff's witnesses, and have set up a substantive case of their own.

SIR C. CRESSWELL: I think you are perfectly right in your statement of the rule. The next of kin always had the right to put the executors on proof of the will in solemn form, without being liable even to have the question of costs considered. When declarations and pleas were substituted for the old form of pleading, the question arose whether the next of kin should, or should not, have the same right. In order to place them as near as possible in the same position, and to put it out of the discretion of the judge to deal with the question of costs, it was laid down that a next of kin, who gave notice that he did not intend to produce evidence, should be in the same position as the next of kin in the Prerogative Court. The

practice since that time has been that, wherever there has been a fair and reasonable ground for contesting a case, I have not condemned in costs. If I have thought there was not fair and reasonable ground, then I have condemned him in costs, although the only issues raised were incapacity and undue execution. But if the parties have chosen to raise other issues of undue influence or fraud, and have failed to prove them, then I have almost invariably condemned in costs. I think that is the rule which has been pursued.

No order as to costs.

1862.
December 6.
SUMMERELL
v.
CLYMENTS.

CUNLIFFE AND ORMEROD v. CROSS.

Pleading.—Practice.

Plea, "that the alleged codicil was not prepared in conformity with the intentions of the deceased, and the deceased at the time of the execution of the alleged codicil was ignorant of the contents thereof:"
HELD bad, on demurrer.

The plaintiffs propounded as executors the will and codicil of Henry Cross, late of Wardle Fold, in the county of Lancaster, who died on the 6th of June, 1862.

Pleas as to the codicil:—1. Undue execution. 2. Incapacity. 3. Fraud. 4. Undue influence. 5. That the said alleged codicil was not prepared in conformity with the intentions of the said deceased, and that the deceased at the time of the execution of the said alleged codicil was ignorant of the contents thereof.

Demurrer to the fifth plea.

Dr. Spinks, for the demurrer, referred to *Middlehurst v. Johnson*, 30 L. J. 14, Prob. & Mat.

Dr. Wambey for the plea.

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SIR C. CRESSWELL : If you were to prove the plea, it would not of necessity destroy the will. A testator may, if he likes, authorize another person to make a will for him, and may say, "I do not know what you have put down, but I am quite "ready to execute it." Such a will would be a good one, would it not ?

Dr. Wambey : No doubt. But we have also pleaded mental incapacity, and we may be able to prove that the testator had not a full knowledge of the contents of the instrument.

SIR C. CRESSWELL : Then why not plead that it is not his will ?

Dr. Wambey : That is an unsatisfactory plea, "for it is not his will" if it was not duly executed, or if the testator was incompetent. It may turn out in this case that, although he was not altogether incompetent, he was so incompetent as to be ignorant of the contents of the will.

SIR C. CRESSWELL : You are relying on some assistance to be derived from another plea ; but it is a first principle in pleading that, in arguing in support of one plea, you cannot derive assistance from another.

Dr. Wambey referred to *Fincham v. Edwards*, 3 Curt. 73.

SIR C. CRESSWELL : I am of opinion that this is not a good plea. *Dr. Wambey* has suggested that there are various ways in which it might turn out that this would be no will. But if the allegations in the declaration are not traversed, you cannot say that it is not the deceased's will on the ground that either of those allegations is untrue. When you say that the paper propounded is not the will of the deceased, you mean that he never signed that paper, meaning that it should operate as his

will. I cannot assume any particular state of circumstances. Suppose you were to prove satisfactorily all that you have alleged in this plea, that the will was not prepared in conformity with the deceased's intention, and that the deceased was ignorant of the contents thereof, you would be entitled to a verdict upon the matter of fact; but would that verdict be of necessity an answer to the declaration? It would not, and therefore this is not a good plea.

1863.

January 14.

CUNLIFFE AND
ORMEROD
v.
CROSS.

Judgment for plaintiffs.

INKSON v. JEEVES AND OTHERS.

Jan. 20 and 27.

Interest.—Pleading.—Practice.

INKSON
v.

JEEVES AND
OTHERS.

A caveat was warned by the widow of a deceased, and the defendants appeared thereto as universal devisees and legatees of the estate of A. B., the universal devisee and legatee of the whole estate of the deceased. The plaintiff thereupon declared, alleging an intestacy. The defendants pleaded propounding a Will, whereof A. B. was sole executrix and universal legatee. On motion for an order to amend the pleas by setting forth how they derived their interest:

Held, that it was too late for the plaintiff to call upon the defendants to set forth their interest after the declaration had been delivered.

The defendants having entered a caveat in the goods of John Inkson, deceased, the caveat was warned by the plaintiff Josephine Inkson, the widow of the deceased. The defendants then entered an appearance as universal devisees and legatees of the estate of Ann Brownfield, the universal devisee and legatee of the whole estate of the said John Inkson. The plaintiff thereupon declared that John Inkson, late of Natal, in South Africa, deceased, died on or about the 15th of April, 1853, at Natal aforesaid, intestate without child, leaving the said Josephine Inkson his widow and relict.

1863. *Pleas*.—1. That John Inkson in the plaintiff's declaration
 Jan. 20 and 27. mentioned, and who died on the 15th of April, 1853, did not
 die intestate, as alleged in the said declaration. 2. That the
 INKSON said John Inkson, being of the age of twenty-one years and
 v. upwards, made his last will and testament, bearing date the
 JEEVES AND OTHERS. 4th of March, 1851, and in the said will appointed Ann
 Brownfield, otherwise Campbell, sole executrix and universal
 legatee. 3. That the said testator being, at the time of the
 making of the said will and of the death of the said testator
 respectively, a natural born subject of Great Britain, was
 resident and domiciled within the district of Natal, in South
 Africa, and that the said testator duly made the said will
 in accordance with the laws in that respect in force within the
 said district. 4. That the will was duly executed. 5. That
 the testator was of sound mind, etc.

Dr. Spinks, for the plaintiff, moved that the defendants' pleas may be ordered to be amended by setting forth such matter as would entitle the defendants to a grant of administration with the will annexed of the paper-writing dated the 4th of March, 1851, which they allege to be the will of the deceased John Inkson, in the event of such will being established. This is an interest suit, and the defendants ought to show a preferable title upon the pleadings. The plea may be true, and yet the plaintiff may be entitled to the grant.

Mr. Pritchard opposed the motion. This is not now an interest suit, but an ordinary testamentary suit, in which one party propounds and the other contests a will. If the plaintiff intended to dispute the defendants' interest, she ought to have called on them to propound it before declaring. It is too late after the delivery of the declaration.

Cur. adv. vult.

January 27.

Sir C. CRESSWELL : This was a question whether the defen-

dants should reform their pleas by showing how they derive their interest. I think it is too late for the plaintiff to ask for that. The plaintiff claims by reason of an intestacy. The defendants, being warned to a caveat, appeared, setting out the title under which they claimed. The plaintiff took no notice of that, but declared. I think, therefore, that if they now set up a will which would defeat the claim of the plaintiff, she has for that purpose admitted their right to set up the will as an answer to her claim.

1863.
Jan. 20 and 27.
INKSON
v.
JEEVES AND
OTHERS.

Mr. Pritchard asked for the costs of the motion.

SIR C. CRESSWELL: I will dispose of the question of costs when I have heard the case.

Motion rejected.

CRITCHELL v. CRITCHELL.

February 17.

Will pronounced against on Opposition of next of Kin.—Costs.

CRITCHELL
v.
CRITCHELL.

A next of kin, who contested the validity of a Will propounded by the widow of the deceased as the sole executrix named therein, which was pronounced against by the Court, but without condemning the widow in costs, held to be entitled to have his costs out of the estate.

The plaintiff in this case, Mrs. Harriet Critchell, propounded a paper-writing, which she alleged to be the last will of her husband John Critchell, deceased, making her universal devisee and legatee, and appointing her his sole executrix. The defendant Mr. Alfred Critchell, a brother of the deceased and one of his next of kin, contested the validity of the will, on the grounds that it was not the will of the deceased, that it was not duly executed, and that the deceased at the time of its execution was not of sound mind, memory, and under-

1863.
February 17.

CRITCHELL
v.
CRITCHELL.

standing. The case was heard on oral evidence before Sir C. Cresswell without a jury, who, after consideration, pronounced against the will, on the ground that he was not satisfied of the testamentary capacity of the deceased at the time of its execution, but made no order as to costs.

Dr. Tristram, for the defendant, now moved the Court to order that the defendant's costs be paid out of the estate. The rule of the Prerogative Court was, that a legatee who propounded and established a testamentary paper *loco executoris*, although he might not be entitled to the grant, yet was entitled to have his costs out of the estate (*Williams v. Goude and Bennett*, 1 Hagg. 610); the costs he had incurred being considered as part of the testamentary expenses incurred by him in doing what the executor ought to have done. The converse of the rule would hold good, namely, that a next of kin who had successfully opposed a will and established an intestacy, although he might not be entitled to the grant of administration, yet was entitled to his costs out of the estate; he having done what the person entitled to grant of administration ought to have done, and the costs he had incurred were costs incidental to obtaining the grant. He also referred to *Dew v. Clark and Clark*; 1 Hagg. 311.

Mr. Searle, for the plaintiff, *contra*: The evidence as to incapacity was so conflicting as fully to justify the plaintiff in propounding the Will. She was exonerated from all blame by the Court. The defendant as heir-at-law takes the realty, which far exceeds the personalty in value; under the circumstances, the plaintiff ought not to have her share in the personalty diminished by its being made to contribute to the plaintiff's costs.

SIR C. CRESSWELL: I think the defendant, under the circumstances, is entitled to have his costs out of the estate.

GLEN *v.* BURGESS AND GOVER.

1863.

March 3.

GLEN

v.

BURGESS AND
GOVER.

Declaration.—Destruction of Will.—Affidavit of Scripts.

When a Will which has been destroyed is propounded, it is not necessary to set out the substance of the will, or to allege its destruction in the declaration. The declaration should, however, if possible, assign a particular date to the Will, and an averment that the deceased in or about a certain month made his last will is *primâ facie* insufficient.

In this case the plaintiff declared that A. B. deceased, who died on or about the 15th of November, 1859, made his last will and testament in or about the month of June, 1856, and in the said will appointed the plaintiff and D. Steward executors, and alleged due execution in the usual terms.

The plaintiff's affidavit of scripts stated that the will propounded had been destroyed by burning or otherwise within a few days after the death of the deceased, and that the contents of the will were set forth in an exhibit annexed to the affidavit.

Dr. Wambey, for the defendants, moved the Court to order the plaintiff to amend his declaration, by stating in the declaration, first, what were the contents of the said will; secondly, what had become of it, and by whom it was destroyed.

Dr. Swabey: As to the first point, no more reason has been stated for introducing the contents of this will into the declaration than the contents of any other will. As to the second point, it might raise as an issue for the jury what is properly matter for the consideration of the Court only, viz. was the original document destroyed or no, so as to admit secondary evidence of its contents either for the jury or the Court, as the case may be.

Cur. adv. vult.

1863.

March 8.

GLEN

v.

BURGESS AND
GOVER.

SIR C. CRESSWELL: I do not think the defendants have any right to have the declaration amended in the terms of the notice of motion; but the declaration should state all particulars within the knowledge of the party, so as to enable the defendants to plead specifically to some particular will. The declaration does not assign any date to the will, but states that the testator made a will in or about the month of June, 1856; it would be better that the declaration should be amended in that particular.

Dr. Wambey intimated that the amendment suggested by the Court was not in the present case material to the defendants.

Motion rejected.

Feb. 19 and 20.

(Before SIR C. CRESSWELL, and a Special Jury.)

CRISPIN

v.

DOGLIONI.

CRISPIN v. DOGLIONI.

Evidence.—Declarations of Family.

On the issue whether the plaintiff was the natural son of H. C., declarations of J. C., brother of H. C., were tendered as evidence of the relationship between plaintiff and H. C.; but the Court

Held, that such declarations did not fall within the exception which admits declarations of members of the family in cases of pedigree.

This was an interest suit. The plaintiff alleged that he was the natural son of Henry Crispin, deceased, a domiciled Portuguese, and that by the law of Portugal he was entitled to succeed to the whole of the property of the deceased if he died intestate, and to two-thirds of it if he died testate. The defendant, a sister of the deceased, denied, among other pleas, that the plaintiff was the natural son of the deceased.

The issue came on for trial before Sir C. Cresswell and a special jury. 1863.

Feb. 19 and 20.

CRISPIN
v.
DOGLIONI.

The Queen's Advocate (Sir R. Phillimore), *Serjeant Shee*, *Mr. Dowdeswell*, *Mr. Hannen*, and *Mr. C. A. Turner*, for the plaintiff.

Mr. M. Chambers, Q.C., *Mr. Cleasby*, Q.C., *Dr. Spinks*, and *Mr. R. E. Turner*, for the defendant.

The Queen's Advocate tendered as evidence the declarations of Jose Crispin, a brother of the deceased, as to the relationship between the plaintiff and Henry Crispin.

Mr. M. Chambers objected.

The Queen's Advocate: There is no decision on the point; the principle upon which declarations of members of the family are admitted in cases of pedigree is, that they must have had the best opportunity of knowing the state of the family.

SIR C. CRESSWELL: Would it not be a fair answer to that argument that the family would not be likely to know the peccadilloes of its different members? A man would not be likely to proclaim the existence of his bastard issue, and therefore the reputation that no such issue existed would be worth nothing.

Mr. Serjeant Shee: The question whether B. is heir-at-law may depend upon the question whether A. is legitimate or illegitimate. The reputation of the family as to A.'s illegitimacy would be evidence.

Mr. Chambers referred to Taylor on Evidence, p. 623 of

1863. third edition. A bastard has no family by the English law,
 Feb. 19 and 20. and therefore there is no such thing as a declaration by a
 member of the family; it would be very unjust to admit the
 CRISPIN declaration of a stranger for the purpose of bastardizing a
 v. person.
 DOGLIONI.

SIR C. CRESSWELL: As the question is to be decided on principle, I certainly think the evidence is inadmissible. The admissibility of hearsay evidence is exceptional, and ought not to be carried further than the decisions in the books, for it is a departure from the first rule of evidence. I can well understand that where a matter is likely to be discussed and well known in a family, a member of the family may be allowed to give evidence of it; but in this case the plaintiff, according to his own account, is *filius nullius* by our law. The question is, whether a declaration of one brother may be admitted as to another brother having had intercourse with a woman, and having had a child by her; I think it ought to be excluded.

Feb. 7 and 17. COOK AND ANOTHER v. LAMBERT AND OTHERS.

COOK AND ANOTHER *Will.—Paper fastened at End of Will.—Signature of Testator and Attesting Witnesses to it.*
 v.

LAMBERT AND OTHERS.

Where the signature of the testator and of the attesting witnesses was made, not on the paper on which the Will was written, but on a piece of paper which had been attached to the paper on which the Will was written:

Held, to be a good execution within 15 & 16 Vict. c. 24, s. 1.

The plaintiffs in this case were the executors of the last will of John Lambert, late of Grundisburgh, Suffolk, beer-house-keeper, deceased, dated the 9th of July, 1859, which

they had propounded in the usual declaration. The defendants denied the due execution of the will.

1863.

Feb. 7 and 17.

The case was heard before the Court without a jury.

COOK AND
ANOTHER
v.

The will was executed under the following circumstances :—

LAMBERT AND
OTHERS.

In July, 1859, the testator requested John Grayson, a shoemaker, who had made a former will, to prepare a fresh will for him, and for that purpose gave him the former will.

The substance of Grayson's evidence was as follows :—

"I made notes of the instructions which deceased gave me
"with a pencil on a bit of paper, for I had to go to my own
"house to write the will. When I got to my house, I took
"the blank sheet from the old will, and wrote the present
"will on it; there was some writing of the old will (an in-
"dorsement or address) on the bottom of the sheet on which
"I wrote this will, and that there might be room for the at-
"testation and signatures, I pasted a piece of paper on the
"bottom, which covered over the writing I have mentioned.
"I put the piece of paper on before I came back to Lambert's
"house. I read the will over to him before the attesting wit-
"nesses came into the room. Lambert set his seal and mark.
"I wrote the testimonium clause before he marked; the at-
"testation clause 'signed, sealed, and delivered,' etc., after he
"marked. I wrote 'John Lambert, the testator, his mark.'
"Crapnell and Cook signed it. I then folded it up, put it in
"an envelope, sealed, and left it with him."

The mark of the testator, and the names of the witnesses, were made on the piece of paper so pasted on.

Crapnell and Cook, the attesting witnesses, were examined. They confirmed Grayson's account of the execution, and on the will being shown them in the witness-box, said that the paper appeared to be in just the same state as when they wrote their names.

SIR C. CRESSWELL: The point is, whether the signature is on a part of the paper on which the will is written.

1863.
Feb. 7 and 17. *Dr. Spinks* argued that there was a due execution. On the evidence the Court must be satisfied that the paper on which the names are written was affixed to that on which the will was written before the execution (*In the Goods of John Gausden*, 2 Swab. & Trist. 362). It would be another matter if it were shown that the names had been written before the paper was affixed.
Cur. adv. vult.

COOK AND
ANOTHER
v.
LAMBERT AND
OTHERS.

Lawrence, contra.

February 17. SIR C. CRESSWELL: In this case, which stood over for consideration, the question raised was, whether the will propounded was duly executed. The circumstances which raised the doubt as to its due execution were, that the attestation clause, the signature of the testator, and the signatures of the attesting witnesses, were made on a piece of paper firmly attached by some adhesive matter to the paper on which the will was written. I am of opinion that this case is substantially the same as the one I decided *In the Goods of John Gausden*, 2 Swab. & Trist. 362, where the will was written on a piece of parchment; and at one corner, at the bottom of the parchment, a piece of paper was pasted, with a stamp impressed upon it, upon which paper the signatures of the testator and the attesting witnesses were subsequently made. I think the signature of the testator must be accepted as a signature made on a part of the will, and so made as to come within the words of the first section of 15 & 16 Vict. c. 24: "The signature being so placed at the end of the will that it is apparent, on the face of it, that the testator intended thereby to give effect to the writing signed as his will;" and I therefore pronounce for the will.

Dr. Spinks asked whether the Court would make any order as to costs.

SIR C. CRESSWELL: This is a case in which the costs of both parties must be paid out of the estate.

1863.

In the Goods of EMILY SUSAN GRAHAM RAFFENEL, Widow, March 3 & 24.
deceased (on Motion).

In the Goods of
EMILY SUSAN
GRAHAM
RAFFENEL.

Domicil of Origin.—Acquired Domicil.—Intention to resume.

B. left Dunkerque, where she had an acquired domicil, with intention of residing in England; she got on board the packet at Calais, but before it left the harbour she was, through illness, obliged to land, and never sufficiently recovered to leave France :

Held, that there was no sufficient act to give effect to the intention to resume the English domicil.

In this case the deceased had her domicil of origin in England, but married a French naval officer, and lived with him in France, at Dunkerque, till his death in December, 1850.

From the affidavit of Leonie Clara Raffeneil, a daughter, and A. M. Bromhead, a cousin and intimate friend of the deceased, it appeared that after her husband's death the deceased frequently expressed her intention of returning to England with the view of permanently residing there; that about the 13th of August, 1853, she left Dunkerque for Calais, and with her children and baggage got on board the packet for England, but before leaving the harbour she was taken so ill as to be obliged to land again at Calais, where she remained about three months, in the hope of getting sufficiently well to undertake the voyage. This not being the case, and the remainder of a term in a house at Dunkerque being still on hand, they returned there on the 20th of November, 1853; the deceased never recovered sufficient strength to resume the journey to England, and died at Dunkerque on the 13th of April, 1854, having in the previous month made a will valid by the law of England, but invalid by that of France. Her property was in England.

Dr. Deane, Q.C., moved the Court for probate of this will.

1863. The deceased's domicile undoubtedly became French by marriage with a Frenchman domiciled and residing in France; March 3 & 24. but it is submitted that the fact of leaving Dunkerque on her journey to take a permanent residence in England is sufficient to give effect to the intention which the deceased had of resuming her domicile of origin. There was an act of abandonment of the acquired domicile.

In the Goods of
EMILY SUSAN
GRAHAM
RAFFENEL.

SIR C. CRESSWELL: I cannot think that the French domicile was abandoned so long as the deceased remained in the territory of France. It must be admitted that she never left France, and that intention alone is not sufficient. I reject the motion.

March 17.

HARENC v. DAWSON AND CLUCAS.

HARENC
v.
DAWSON AND
CLUCAS.

Affidavit of Service of Citation, and of Search for Non-Appearence.—Practice.

An affidavit of service of a citation should identify the citation served; the citation should be made an exhibit to the affidavit.

An affidavit of search and of non-appearance should state the day on which the search was made; and where two persons have been cited and neither has appeared, it should state that no appearance has been entered by or on behalf of either of them.

This was an application for a grant of limited administration of the effects of John Christian, deceased. The deceased had left a will, whereof he appointed the defendants executors, who had both been cited, but had not appeared.

There had been filed affidavits of service of the citation on each of the defendants, in the following forms:—"I did, on the 24th of February, 1863, duly serve *F. B. C.*, of, etc., with a true copy of a citation issued out of this Honourable Court,

by delivering the same to the said *F. B. C.*, of, etc., aforesaid, and at the same time, at his desire and request, I showed him the original thereof."

The affidavit of search, after stating that search had been made in the books kept in the registry for entering appearances, but not the day on which the search was made, continued, "and I further make oath and say, that no appearances have been entered by or on behalf of the said Richard Crosbie Dawson and Frederick Brew Clucas to the said citation."

Mr. G. H. Cooper moved for a limited grant on the above affidavits.

SIR C. CRESSWELL: The affidavits of service and of non-appearance are defective, and must be re-sworn. The former refers to a citation served, but does not identify it. It does not appear that it was the citation in this suit. The latter should have stated the day on which the search was made, and also that no appearance had been entered by or on behalf of either of the parties cited.

FERREY v. KING.

Will.—Plea of undue Execution.—Evidence of attesting Witnesses.—Costs.

Plaintiff, executor, propounded a Will, to which the defendant, next of kin, pleaded undue execution, but gave no notice of merely cross-examining plaintiff's witnesses. At the trial the plaintiff examined one attesting witness, who proved due execution; the defendant called the other attesting witness, who negatived due execution, and the jury found a verdict establishing the Will. The Court made no order as to costs.

The plaintiff as executor propounded the will of James

1863.

March 17.

HARENC

v.

DAWSON AND
CLUCAS.

1861.

November 28.

FERREY

v.

KING.

1861. King, late of Christchurch, Hants, deceased. The defendant,
November 28. the brother of the deceased, pleaded that the will was not duly
executed. The issue joined on the plea was, on the 27th of
November, 1861, tried before Sir C. Cresswell, by a jury.
The only question was, whether the will was duly attested.
The names of the attesting witnesses were Tanner and Barnes.
Tanner was called as a witness by the plaintiff, and proved the
due execution of the will on the 12th of February, 1858.
Barnes was called by the defendant, and he admitted that he
had signed the will in the presence of the deceased and of
Tanner, but said that neither the deceased nor Tanner had
signed in his presence. The jury found that the will had been
duly executed, and Sir C. Cresswell decreed probate.

FERREY
v.
KING.

Dr. Deane (*Dr. Wambey* with him), on behalf of the
plaintiff, asked that the defendant should be condemned in
costs. No notice was given that the opposition to the will
would be confined to the cross-examination of the attesting
witnesses.

Dr. Spinks, contra, asked that the defendant's costs might
be allowed out of the estate. In the Prerogative Court, the
plaintiff would have been bound to produce both the attesting
witnesses, and if he had done so, the defendant would not have
been obliged to call any witnesses, and could have given notice
that he should only cross-examine the attesting witnesses.
Where the attesting witnesses give contradictory evidence as
to the execution, the next of kin has a right to have the
matter investigated; and, unless there is reason to believe
that the defendant has suborned the witness upon whose
evidence he relied, he ought not to be condemned in costs.

SIR C. CRESSWELL: I am generally disposed to make the
losing party pay the costs, but I will take time to consider the
question.

SIR C. CRESSWELL now said: I have considered the question; I shall make no order as to costs.

1861.
November 28.

FERREY
v.
KING.

LISTER AND OTHERS v. SMITH.

1862.
March 18 & 25

The latter of two Wills propounded.—Citation to see Proceedings.—Persons interested in Real Estate under earlier Will.—Practice of Prerogative Court.—Court of Probate Act, sect. 61.

LISTER AND
OTHERS
v.
SMITH.

Where an executor propounds the latter of two Wills, the Court will direct a citation to issue against the devisees under the earlier Will, and against the heir-at-law, though already before the Court, as defendant in the suit.

Mr. Ralph Wheeldon Smith, the deceased in this cause, had left a will, dated October 26th, 1858, and a codicil, dated July 27th, 1860, disposing of real and personal estate, which was propounded by the plaintiffs as executors named therein. The deceased had also left a will, dated the 11th of March, 1852, and a codicil thereto, dated July 25th, 1857, by which he made, in some respects, contrary dispositions of his real estate.

Dr. Tristram moved the Court on behalf of plaintiffs to direct a citation to see proceedings to issue against Ralph Wheeldon Smith (the defendant), as the heir-at-law of the deceased, and also against Thomas Smith, Mrs. Julia Mason, and others interested in the deceased's real estate under his will of March 11, 1852, and his codicil of July 25, 1857.

SIR C. CRESSWELL: I understand that you propose to cite Thomas Smith, Mrs. Julia Mason, and others, not as inter-

1862. ested in the deceased's real estate under the will and codicil
 March 18 & 25. propounded, but as interested in it under the previous will and
 codicil, which have not been propounded in this suit. By the
 LISTER AND 61st section of the Probate Act, the heir-at-law, devisees, and
 OTHERS
 v.
 SMITH. other persons having or pretending interest in the real estate
 affected by the will which is the subject-matter of the suit,
 may be cited to see proceedings in like manner as the next of
 kin or others having or pretending interest in the personal estate
 affected by the will should be cited. I will direct a citation
 to issue against the heir-at-law. The other parties proposed
 to be cited are in the same position as legatees under a will of
 prior date would have been in the Prerogative Court. If by
 the practice of the Prerogative Court an executor propounding
 a will could cite the legatees of a prior will to see proceedings,
 I will direct a citation to issue against the devisees of the will
 of 1852. Can you furnish me with any authority on this
 point?

Dr. Tristram apprehended that by the practice of the Prerogative Court an executor who propounded a will was entitled to cite all parties interested in contradicting that will, whether in the character of next of kin or of executors or legatees of other testamentary instruments of the deceased. Unless he had been entitled to do this, the great advantage of proving a will in solemn form, so as to make the probate universally binding, would be defeated. If the Court would permit the motion to stand over, he had no doubt that he should be able to furnish an authority on the point.

SIR C. CRESSWELL: The motion may stand over.

March 25. *Dr. Tristram* renewed the motion. He could find no reported case in which the question raised had been decided. There was a passage in 'Williams on Executors,' 5th edition, p. 300, which favoured the motion, in which it was stated

“that the executor may, and in prudence often does, for greater security, propound and prove the will in the first instance, *per testes*, of himself, citing the next of kin, and all others ‘pretending interest in general’ to ‘see proceedings,’ which being done, the will shall not be set aside afterwards (provided there be no irregularity in the process) when the witnesses are dead.” See also 1 Oughton’s Ord. tit. 6, s. 5. The practice of the Prerogative Court on this point was very clearly stated in the following passage contained in the Report of the Ecclesiastical Commission of 1832, p. 32, which Report was, amongst others, signed by Sir John Nicholl, Sir Christopher Robinson, Sir Herbert Jenner, and Dr. Lushington:—
 “There is another process in testamentary matters, extremely useful and frequently resorted to, which it may be proper here to state. The executor or other person claiming to take the grant of probate of a will or other testamentary instrument may cite the next of kin, and other parties interested under an intestacy, or a former will, to appear and see the will propounded and proved by witnesses; and, if the parties cited do not appear and oppose the probate, they are barred from afterwards contesting its validity, unless on account of absence out of the kingdom, or the like sufficient cause for non-appearance be shown.”

1862.

March 18 & 25.

LISTER AND
OTHERS
v.
SMITH.

SIR C. CRESSWELL: Upon this voucher of what was the practice of the Prerogative Court, I will direct the citation to issue against the devisees of a former will, as well as against the heir-at-law.

Dr. Swabey appeared for the heir-at-law. He was already a party to the suit. It seemed unnecessary therefore to cite him. If the citation issued against him, he submitted that he should, in no event, be made liable for the costs of the citation.

SIR C. CRESSWELL: I can make no order beforehand to exempt him from the costs.

1862.

May 18.

In the Goods of
MARTHA
MANLY.

In the Goods of MARTHA MANLY (deceased).

Will.—Construction.—Executrix according to the tenor.

A. B. duly executed a testamentary paper in the form of a letter, beginning "My dear Eliza," and containing full information as to the amount of her property, with full directions as to how she wished it to be disposed of, and concluding with these words: "I know of nothing else, my dear Eliza, to trouble you with, and trust that this will not involve you in much."

The Court decreed probate of the said paper-writing to E. M. A., as executrix according to the tenor.

Martha Manly, late of Sydenham, widow, deceased, died on the 19th of August, 1861. On the 13th of June, 1861, she duly executed the following testamentary paper:—

"My dear Eliza,—When these lines reach you I shall no longer be an inhabitant of this world. My only anxiety is my poor sister; and I feel that I cannot die with comfort until I have made some arrangement for her continuance under the protection so kindly and so wisely procured for her by my best friends. She will lose nothing by my death. The sum now paid to Mr. Hitchcock, £48 per annum, is her own; £30 pension, and the rest in the funds. The pension I have always received; the dividends in the Bank have been received by my agent, Augustus Chippendale, 10, John Street, Adelphi, and through him Mr. Hitchcock has always been paid. You, my dear Eliza, have been so invariably kind to me, I now take the liberty of asking you to extend that kindness to my beloved sister by seeing that her wants are provided for. Mr. Hitchcock is paid half-yearly in July and January, the 6th of which month it becomes due. With respect to her pension, Edward Hooper, I am sure, would manage that willingly. The copy of my father's will and the permission granted me by the Admiralty in the year 1826 to receive her pension, you will find in the pocket-

“book that will be delivered to you, wherein also I hope will
 “be found sufficient money to bury me decently. I have no
 “debts at this present time, and I cannot be in debt to my
 “agent, as he has received my annuity of £45. 11s., and my
 “sister’s dividend from the bank, £18, making £63, from
 “which he has paid £48 to Mr. Hitchcock, and £10 to me
 “annually, so I think he must be my debtor. I have never
 “drawn upon him for more than the above-mentioned sums.
 “I have nothing to leave but my furniture, which would be
 “of no use to my sister. Before I sunk my money for an
 “annuity, I made a will leaving all to her; in the event of
 “her death, to my cousin, Martha Ann Keen; in case of her
 “death, to the late Mary Ann Leigh. That will was left in
 “the care of my then agent, John Chippendale, the father of
 “my present agent, and Mrs. Addams was appointed execu-
 “trix. This is now my will, for in the event of my sister
 “dying before me, I am heir to her property, £18 per annum
 “from money in the funds, the particulars of which Mr.
 “Chippendale can explain. That sum, my dear Eliza, I wish
 “you to have; if you do not need it, as I trust you do not,
 “you will know how to dispose of it. I am convinced no
 “one will make a better use of it, and if it were hundreds,
 “I could never repay what I owe to you and yours. My
 “books, I think, might be acceptable to my kind friends the
 “Misses W.; my plate to Mrs. P.; my furniture to Mrs.
 “F., after you have selected any that might be useful to
 “yourself. I most especially wish you to have the two stools
 “worked by my mother, they will not disgrace any drawing-
 “room, and my watch, which is a gold one, and was the only
 “thing saved by my husband when wrecked in the ‘Apollo,’ in
 “1804. I know of nothing else, my dear Eliza, to trouble
 “you with, and trust that this will not involve you in much.
 “I can only pray that every good will attend you in this and
 “the world to come, and am faithfully yours,

1862.

May 18.

 In the Goods of
 MARTHA
 MANLY.

(Signed) “MARTHA MANLY.”

1862.

May 28.

In the Goods of
MARTHA
MANLY.

"Signed, declared, and acknowledged by the said Martha Manly as and to be her last will and testament, in the presence of us both, present at the same time, who in her presence, at her request, and in the presence of each other, do hereunder subscribe our names as witnesses.

"Louisa S. Addams, spinster, Sydenham; Anne Maria F., spinster, Sydenham. Sydenham, June 13th, 1861."

After having executed the above paper, the deceased handed it to Miss Louisa Sawyer Addams, enclosed in an envelope, addressed in the deceased's own handwriting to "Miss Eliza Addams."

The above circumstances were deposed to in a joint affidavit of Miss Louisa Sawyer Addams and Miss Eliza Mary Addams, who stated that from their acquaintance with the deceased, and from her own statement on the subject, they entertained no doubt that by the person addressed in the body of the said paper as "Eliza," and on the envelope as "Miss Eliza Addams," the deceased intended the deponent, Eliza Mary Addams.

Dr. Tristram moved the Court to decree probate of the said paper-writing as the last will and testament of the deceased, to be granted to Eliza Mary Addams as executrix, according to the tenor. The fact of its being addressed to Miss Eliza Addams, and from its containing full information as to the amount of deceased's property, and how she wished it to be disposed of, it would appear that she intended her to have the management of it after her death. From the words also, "I know of nothing else, my dear Eliza, to trouble you with, and trust that this will not involve you in much," it was evident that she intended her to act as her executrix.

SIR C. CRESSWELL: I think, upon reference to the cases,

that there is enough to justify me in granting probate of this will to Miss Eliza Mary Addams, as executrix according to the tenor.

1862.
May 23.

In the Goods of
MARTHA
MANLY.

NASH v. YELLOLY.

November 25.

Executor.—Next of Kin opposing Will.—Costs.

NASH
v.
YELLOLY.

Where a next of kin, defendant, successfully opposed, on the ground of undue influence exercised by the executor and by the residuary legatee, a Will propounded by the executor, the Court condemned the executor, plaintiff, in costs. The plaintiff was also executor under an earlier Will, which appointed the same residuary legatee, under which the executor took nothing, and the Court refused to make an order securing out of the estate to the defendant such costs as he might not be able to recover from the plaintiff.

The plaintiff in this case propounded an alleged last will of Robert Yelloly, late of Berwick-on-Tweed, deceased, made in 1861, as one of the executors named therein. The defendant, who was the son and heir-at-law of the deceased, contested the validity of this will. The issues raised on the pleadings were tried at the summer assizes held at Newcastle in 1862, when the jury found that the making and execution of the said will was procured by the undue influence of the plaintiff and Mary Ann Smart.

Dr. Tristram moved the Court to pronounce against the will, to condemn the plaintiff in costs, and to direct such of the defendant's costs as he might not recover from the plaintiff to be paid out of the estate. There was no precedent for the last part of the application, but he contended that on principle it should be granted. The deceased had left other wills: the plaintiff and a Mr. Wilson are executors of a will made in 1860, the one which will now take effect, and in both the will

1862. of 1860 and 1861, he had appointed his daughter Mary Ann
November 25. Smart (one of the persons who, according to the verdict of the
jury, was guilty of obtaining the will of 1861 by undue influence) his residuary legatee. The bulk of the deceased's property consisted of realty, which by the will of 1860 he devised to the defendant, and by the will of 1861 to Mary Ann Smart. The plaintiff was a nude executor, and Mary Ann Smart was the person interested in sustaining the will of 1861. If the defendant had been appointed one of the executors of the will of 1860, he would be entitled, on proving it, to take out of the estate the costs he was unable to recover from the plaintiff, as part of the testamentary expenses incidental to obtaining probate of that will. But from the mere accident of his not being executor he would lose this security for costs, unless the Court would make the order as prayed. The person whom the order would really prejudice was Mrs. Smart, the residuary legatee; and as the costs were incurred in consequence of her misconduct, it was more equitable that she should suffer than the defendant, who had been doing what the executors of the will of 1860 ought to have done.

NASH
v.
YELLOLY.

Mr. Temple, Q.C., contra.

SIR C. CRESSWELL pronounced against the will, condemned the plaintiff in the costs of the suit, but, in the absence of a precedent, declined to saddle the estate with costs not recovered from the plaintiff.

Dr. Tristram (by permission of the Court) again mentioned this case, and said there was a case of *Bewsher v. Williams and Others*, not reported, which he submitted would be an authority for ordering the costs not recovered from the plaintiff to be paid out of the estate. *Cur. adv. vult.*

SIR C. CRESSWELL: In this case I was asked not only to condemn the plaintiff in costs, but to give such costs out of

the estate as the defendant might fail to get from the plaintiff. The learned Counsel said he could not find any authority for such an order ; but he furnished me afterwards with the papers in *Bewsher v. Williams*. I apprehend that that case differs very materially from the present. In Dr. Tristram's case the plaintiff set up the will, and the defendant rested his opposition on the grounds of incapacity, want of due execution, and undue influence and control. The third plea was found for the defendant, and it was the duty of the Court to pronounce against the will. The defendant was not a party interested under the will ; but he was interested, together with others, in what might be the consequence of invalidating the will. Who were the other parties interested I do not know. *Bewsher v. Williams* was a remarkable case. A woman made a will in Belgium in favour of an infant child, who was substantially sole legatee, but left a small legacy to her sister Mrs. Ball, and appointed Williams executor. Bewsher set up an earlier will. Williams, being cited, would not propound the will of which he had been made executor, and Mrs. Ball, really for the benefit of the infant (for she herself was hardly interested at all), propounded the will, and went to the expense of trying the case and establishing the will. Bewsher and the infant were the persons mainly interested in the property. Therefore it was very fair and reasonable that Mrs. Ball should have the costs out of the estate. For under the circumstances, there being evidence from which it might be inferred that there was insane delusion, I could not fairly call on the other party to pay the costs of disputing the will. That was such a different case that it was no precedent for the one now under consideration. I think I ought not to extend the practice of ordering costs out of the estate, and therefore the defendant must rely on the party who has been condemned in costs for payment.

1862.

November 25.

NASH

v.

YELLOLY.

1861.

January 30 and
February 20.

BEWSHER

v.

WILLIAMS,
BALL, AND
OTHERS.

BEWSHER v. WILLIAMS, BALL, AND OTHERS.

Will established by Legatee.—Costs out of Estate.

B., acting really in the interest of an infant residuary legatee, succeeded in establishing a Will, under which she herself took only a trifling legacy: the executor having refused to propound the Will.

The Court held that the circumstances of the case were such as to warrant the opposition to the Will, and at first refused to make any order as to costs; but, on the representation that B. was not primarily entitled to the grant With the will annexed, and so might never be in a position to repay herself the expenses of the suit, it ordered her costs to be paid out of the estate.

Being cited to propound and prove a Will is a distinct matter from being cited to take probate under 21 & 22 Vict. c. 95, s. 16.

SEMPLE, the Court has power to vary a previous decree.

See Williams v. Bewsher, 355

The testatrix in this case was Miss Lucinda Bourne Darling, who died at Ramsgate on the 19th of April, 1859, leaving two testamentary papers; namely, a will, dated the 15th of March, 1853, wherein she appointed the Rev. James Bewsher, the plaintiff, residuary legatee; and another will, dated the 15th of March, 1857, wherein she appointed Williams executor. Mr. Bewsher (the plaintiff) propounded the will of 1853, citing the executor and parties interested under the will of 1857 to propound and prove it in solemn form if they thought fit to do so. Mrs. Ball, who had a legacy—an Indian workbox—was the only person who appeared to this citation. The bulk of the deceased's property was left to an infant, whose interest Mrs. Ball was anxious to protect. She accordingly propounded the will of 1857, in a declaration, the validity of which was contested by the plaintiff Bewsher, on the ground of the deceased's insanity.

The case came on before Sir C. Cresswell without a jury, when—

Mr. Manisty, Q.C., and *Dr. Spinks* appeared for the plaintiff, and *Dr. Wambey* for the defendant.

1861.

January 30 and
February 20.

Several witnesses were examined for the plaintiff, to show that the testator was labouring under a delusion at the time of making the will of 1857, and was therefore of unsound mind.

BEWSHER
v.
WILLIAMS,
BALL, AND
OTHERS.

SIR C. CRESSWELL, after taking time to consider, gave judgment and pronounced for the will, and refused to make any order as to costs.

Dr. Wambey moved the Court to grant letters of administration, with will annexed, to Mrs. Ball, without requiring her to cite the other parties interested under the will.

February 20.

SIR C. CRESSWELL: There is an objection to my granting this motion. You have not cited the executor and residuary legatee named in the will.

Dr. Wambey: They were cited by Mr. Bewsher to propound and prove the will of 1857 in solemn form of law, and failed to do so. Mr. Williams's right to the executorship is therefore at an end, for by the 16th section of the Probate Act, 1858, when an executor is cited to take probate and does not appear to such citation, his right to the executorship wholly ceases.

SIR C. CRESSWELL: I do not think that in the citation you speak of the term "prove" is used according to the meaning or the spirit of this section. There is a difference between being cited to propound and prove a will, and being cited to take probate. I cannot make the grant to Mrs. Ball until Mr. Williams has renounced, or has been cited to take probate.

Dr. Wambey, under this uncertainty of Mrs. Ball obtaining

1861. administration with the will annexed, moved the Court to
 January 30 and direct that Mrs. Ball's costs should be paid out of the estate.
 February 20. She had no interest in propounding the will, but did so for
 ——— the benefit of an infant, after the executor had declined to
 BEWSHER propound it; and having succeeded in establishing it, it was
 v. only equitable that she should have her costs out of the
 WILLIAMS, estate.
 BALL, AND
 OTHERS.

Sir C. CRESSWELL took time to consider whether he had power to vary the decrec already made in the cause, but subsequently granted the motion.

1863.

KENWORTHY v. KENWORTHY AND WATSON.

January 27.

Citation by Advertisement.—Agent.—Form of Affidavit.

KENWORTHY

v.

KENWORTHY
AND WATSON.

When a party is cited by advertisement, and has no agent in this country, there should be an affidavit that he has no attorney, agent, or correspondent in this country.

This was an application for a grant of administration, with the will annexed, to be made to Elizabeth Kenworthy, the plaintiff, as beneficial residuary legatee named in the will of Hugh Kenworthy, deceased. The deceased died in 1854 and left a will, appointing the defendants his executors and residuary legatees in trust. The will had not been proved. Watson, one of the defendants, had been personally cited and had not appeared. John Kenworthy, the other defendant, went to Australia in 1854, and was last heard of in June or July, 1860, when he was resident at Melbourne; he had been cited by advertisement. The plaintiff in her affidavit stated that the said John Kenworthy had no lawfully appointed agent or attorney in this country.

Dr. Tristram moved for a grant.

1863.

January 27.

SIR C. CRESSWELL: The plaintiff's affidavit of John Kenworthy not having any agent in this country is not in a proper form. She says that he has no lawfully appointed attorney or agent in this country. I do not know what she means by lawfully appointed attorney or agent. The form of affidavit adopted in the registry is, that the person cited has no attorney, agent, or correspondent in this country. She should make an affidavit in this form.

KENWORTHY
v.
KENWORTHY
AND WATSON.

Dr. Tristram asked the Court, as the property was under £100, and as the executors had omitted to prove the will for six years, to allow the grant to be made without renewing the motion, on such an affidavit being filed in the registry.

SIR C. CRESSWELL: Under the circumstances I will allow it.

In the Goods of CHARLOTTE ELIZABETH HAGGER (deceased). March 17 & 24.

Next of Kin of Minors abroad.—Citation and Renunciation dispensed with.—Probate Act, 1857, sect. 73.

In the Goods of
CHARLOTTE
ELIZABETH
HAGGER.

The Court granted administration under the 73rd section of the Probate Act to the guardian elected by minors for their use and benefit, without requiring the citation or renunciation of their next of kin, where the property was very small and the next of kin were in Australia, and their interest was infinitesimal.

Dr. Wambey moved for a grant of letters of administration of the estate and effects of Charlotte Elizabeth Hagger, deceased, to C. H. Pickford, the guardian elected by the children of the deceased, for their use and benefit, or till one of them

1863. should attain the age of twenty-one, without citing the brothers of the deceased. C. E. Hagger died on the 22nd of March 17 & 24. December, 1862, a widow and intestate, leaving three daughters and two sons, all of whom were minors under the age of twenty-one. She was the widow of a veterinary surgeon in the Madras army, and she and her children were entitled to pensions from the Medical Fund. At the time of the death of the deceased the property consisted of £100 arrears of pensions. She left three brothers her surviving; one of whom was in Queensland, and the others in New Zealand. C. H. Pickford had been duly elected by the children as their guardian. In some cases the Prerogative Court had departed from the rule of requiring that the next of kin of minors should renounce or should be cited (*In the Goods of Widger*, 3 Curt. 55; *In the Goods of Ewing*, 1 Hagg. Ecc. 381). The Court might grant administration under the 73rd section of the Probate Act, 1857.

Cur. adv. vult.

March 24. SIR C. CRESSWELL: I have looked at the cases cited, and I think that, as the interest of the next of kin abroad is infinitesimal, the grant may without inconvenience be made under the 73rd section, without citing them or requiring their renunciation.

Administration granted as prayed.

February 24. In the Goods of WILLIAM WALTER HOLMES DUTTON
(deceased), on Motion.

In the Goods of
WILLIAM
WALTER
HOLMES
DUTTON.

Will.—Codicil.—Revocation of Will.—Presumptive Revocation of Codicil.

B. duly executed a Will on the 3rd of July, 1852, and on the 16th of October, 1857, a Codicil, described as "a codicil to my will of the 3rd of July, 1852," by which Codicil he left a legacy to N., and other-

wise confirmed his Will. B. handed the Codicil to N., and it remained in her custody till B.'s death on the 7th of January, 1863. In September, 1860, the deceased expressed his displeasure with certain legatees under the Will, and in the presence of N. took the Will out of a box, cut off his own signature and those of the attesting witnesses, and replaced the the mutilated paper in the box, where it was found at his death. At various times between September, 1860, and his death, B. gave certain instructions to his solicitors with respect to another Will, but nothing was ever settled or completed. Three or four days before his death deceased executed a bond securing to N. a monthly payment of £4.

1863.

February 24.

In the Goods of
WILLIAM
WALTER
HOLMES
DUTTON.

On motion for administration with the Codicil annexed, the Court refused to make the grant on motion, at least without citing those interested in an intestacy, and intimated its opinion that there was nothing to rebut the presumption that the revocation of the Will was a revocation of the codicil.

William Walter Holmes Dutton, late of 29, Beaufoy Terrace, in the parish of Saint Marylebone, in the county of Middlesex, a major-general in Her Majesty's forces, died on the 7th of January, 1863, a widower, without a parent, and without having had any children, leaving Charles Dutton, his natural and lawful brother and sole next of kin.

On the 3rd of July, 1852, the deceased duly made and executed his will in favour of certain of his relations, viz. his sister Matilda Breton, and the children of his nephew Frederick Breton, and the two daughters of the Rev. John Buchanan, all in the said will more particularly named, and on the 16th of October, 1857, the deceased duly executed a codicil to his said will, by which he bequeathed to his housekeeper Sarah Nicoll a legacy of £100, and the said Sarah Nicoll then received the said codicil from the said deceased, and retained possession of it from that time until the death of deceased.

In the month of September, 1860, the deceased revoked his said will in the manner following :—

The deceased one morning called the housekeeper into the

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February 24.

In the Goods of
WILLIAM
WALTER
HOLMES
DUTTON.

dining-room at his house at Herne Bay, where the deceased was then residing, and explained to his housekeeper that the said John Buchanan and Thomas Godfrey had given him very great offence, and had made use of most insulting language in reference to him the said deceased; he then asked for a pair of scissors, and opening a certain box with a Bramah lock, in which he kept his papers, he said, "No one shall ever reap any benefit from me who abuses me in my lifetime; now see what I'll do." He then took out his said will, which was sealed up, from the said box, and deliberately and carefully cut off that portion of the said will upon which was written the signature of deceased, and the witnesses thereto; and deceased then replaced the said will in the said box and locked it, and the said will so remained in the said box from that time down to the time of the death of the said deceased, when the said box was taken possession of by the said Charles Dutton, the natural and lawful brother and sole next of kin of the said deceased. The will was stated to be in all respects in the same plight and condition as after it was mutilated by the deceased. It appeared that certain instructions were at various times up to within a few days of his death given by deceased to his solicitors, with the view to the preparation of a fresh will, but such will was never finally settled or approved by him; and that on the 3rd of January last the deceased executed a bond securing to Sarah Nicoll, if in his service at the time of his death, a monthly sum of £4.

The codicil was in the following terms:—

"This is a codicil to the last will and testament of me W. H. Dutton, of the town of Herne Bay, in the county of Kent, a colonel in Her Majesty's service, which will bears date the 3rd day of July, 1852. I bequeath to my housekeeper Sarah Nicoll, widow, a legacy of £100, such legacy to be paid to her clear of duty within three calendar months after my decease, and to be in addition to the wages that may at my decease be due to her, and in addition also to

“any testamentary dispositions in her favour heretofore made 1863.
 “by me. In all other respects I confirm my said will. In February 24.
 “witness,” etc.

In the Goods of
 WILLIAM
 WALTER
 HOLMES
 DUTTON.

Dr. Spinks now moved the Court to grant administration with the codicil annexed. The 20th section of the Wills Act requires intention to revoke either will or codicil; there is no proof here of intention to revoke the codicil, which was left by the deceased in the custody of the person benefited by it after the will was destroyed. He cited *In the goods of Richard Halliwell (deceased)*, 4 N. C. 400; and *Clogstoun v. Walcott*, 5 N. C. 623.

SIR C. CRESSWELL: It cannot be put it so high as that; since the Wills Act there is no such thing as presumptive revocation of a codicil by the destruction of the will. At present I shall reject this motion; those interested under the intestacy must be cited. But the inclination of my opinion is, that the codicil is revoked; that, taking the nature of the codicil into account, and the subsequent conduct of the testator, there is nothing to rebut the presumption that the revocation of the will was also a revocation of the codicil.

In the Goods of GRAHAM (deceased).

April 28.

Two Testamentary Papers.—Different Executors.—Probate. In the Goods of GRAHAM.

G., a widow, by Will, dated February 25th, 1861, bequeathed certain specified property, over which she had a power of appointment under her marriage-settlement, between her four sons, R., L., W. and G., and made R. sole executor.

By another testamentary paper, dated the 28th day of October, 1862, she left all the property of which she might die possessed between

1863.

April 28.

—
In the Goods of
GRAHAM.

her three sons L., W., and G., and appointed W. sole executor.

The Court held that both papers ought to be included in the probate.

Hannah Graham, late of Lee, in the county of Kent, widow, died on the 17th of February, 1863. In her lifetime she had made two wills. The first, dated February 25th, 1861, was as follows:—

“I, Hannah Graham, widow, will and bequeath the whole sums of money now invested in railway stock, in trust of my sons Reuben and Loftus Graham, to my four sons Reuben, Loftus, William Wallace, and George Madden, to be divided equally between them, share and share alike. And as at the time of my decease my four sons above-named may not then be all living, I will and bequeath the whole sums of money above-named to whichever of the above-named may then be living, to be equally divided between them, share and share alike. And in case one only of the above-named should be living at the time of my decease, I will and bequeath the whole sums above-named to that survivor. To my two elder sons, Christopher Alexander and John Alfred, I will and bequeath two sovereigns each, for the purpose of providing a ring. And I appoint my son Reuben Graham my sole executor.”

The second testamentary paper, dated October 28th, 1862, was as follows:—

“This is the last will of me, Hannah Graham, widow. I leave all the property of which I may die possessed, of whatever sort or kind, to my sons Loftus and William Wallace and George Madden, to be equally divided, share and share alike, to the above-named. In case of the decease of any of those named, the survivor or survivors to have it equally divided. And I appoint William Wallace my sole executor.”

It appeared upon affidavit that the property disposed of by the first will was property which the deceased, under her marriage-settlement, had power to appoint by deed or will.

The property, exclusive of the trust-fund, being under the value of £20, no probate was required in respect of it.

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In the Goods of
GRAHAM.

Mr. R. Pritchard moved the Court to decree a limited probate of the first testamentary paper to be granted to the Rev. Reuben Graham, the sole executor named therein, or probate of both the papers. The question is, whether both scripts are entitled to probate, or whether the second is so inconsistent with the first as to revoke it. The first disposes of specified property only, over which she had a power of appointment; the second, of all the deceased's property, and gives it to three of her sons, whereas by her first she had given it among four, and also appoints a different executor.

SIR C. CRESSWELL: I think the second script did not revoke the first, and that probate must be granted of both scripts.

GEAVES v. PRICE.

May 28.

Two Testamentary Papers.—Different Executors.—Probate.

GEAVES

v.

PRICE.

D., on the 3rd of January, 1853, devised and bequeathed all his real and personal estate to P., and appointed him "sole executor of this my will."

In March, 1862, by a paper purporting to be his last Will, he devised and bequeathed two houses as described, and their appurtenances, to G., and made G. "sole executor of this my will."

The Court held that the two executors were jointly entitled to probate of both papers.

The question in this case was, whether a will of William Clifton Deane, dated the 3rd of January, 1853, was revoked by a later will, dated the 12th of March, 1862.

Declaration (by plaintiff) propounding a will of William

1863.

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GEAVES

v.

PRICE.

Clifton Deane, late of the city of Hereford, bearing date the 12th of March, 1862, whereof William Geaves, the plaintiff, was appointed sole executor.

Plea that the paper-writing bearing date upon the 12th of March, 1862, was in the words and to the effect following, to wit:—

“This is the last will and testament of me, William Clifton Deane, residing in Friars Street, in the parish of All Saints, in the city of Hereford. First, I direct all my just debts and funeral expenses to be paid by my executor hereinunder named; I do hereby devise and bequeath to William Geaves those two dwelling-houses and appurtenances thereunto belonging, and now in the occupation of George Willis and Thomas Rhina, situate in Friars Street, in the parish of All Saints; and I hereby appoint William Geaves sole executor to this my last will. In witness whereof I have hereunto set my hand this 12th day of March, 1862.”

That the said paper-writing was not and did not by itself contain the last will and testament of the said William Clifton Deane, otherwise William Deane, for that the said William Clifton Deane, otherwise William Deane, made his last will and testament, bearing date on the 3rd of January, 1853, and therein appointed the said James Gilbert Price (the defendant) sole executor. That the said will, after having been reduced into writing, was in the words and to the effect following, to wit:—

“This is the last will and testament of me, William Deane, of the city of Hereford, in the county of Hereford, yeoman. I direct that all my just debts and funeral and testamentary expenses shall be paid by my executor, hereinafter appointed, as soon as conveniently may be after my decease; and subject thereto I give, devise, and bequeath all my real and personal estate of what nature or kind soever, and wheresoever situated, unto James Gilbert Price, of Llan-cillow Hall, in the county of Hereford, Esquire, his heirs,

"executors, administrators, and assigns, for his and their own absolute use and benefit. I nominate and appoint the said James Gilbert Price sole executor of this my will, revoking all former and other wills by me heretofore made, and declaring this to be my last will and testament. In witness," etc.

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GRAVES

F.
PRICE.

The pleas then alleged due execution and the capacity of the testator, and that the two paper-writings, bearing date respectively the 12th of March, 1862, and the 3rd of January, 1853, together contain the last will and testament of the said William Clifton Deane, otherwise William Deane.

Replication, that the paper-writing bearing date the 12th of March, 1862, is, and does by itself contain, the last will and testament of the said William Clifton Deane, otherwise William Deane; that the paper-writing bearing date the 3rd of January, 1853, was and is revoked by the paper-writing bearing date the 12th of March, 1862.

Dr. Wambey, for the plaintiff: The will of 1853 was revoked by that of 1862 (*Plenty v. West*, 1 Rob. 264). In that case the testator left two wills: the earlier, dated 1837, disposed of all his property, real and personal, but appointed no executor; the later, of 1838, appointed executors, but did not dispose of all the personalty, and purported to be the "last will" of the testator. Sir H. J. Fust held that the earlier will was revoked. The Judicial Committee of the Privy Council, in commenting upon the case in *Cutlo v. Gilbert*, 9 Moo. P. C. 131; s. c. 1 Eccl. & Adm. 422, says,— "Upon this case we will first observe that the two wills were essentially different, that no executors were appointed by the first, that executors were appointed by the second, and that the only ground of argument was that the whole of the personal estate was not disposed of by the second will. It is true Sir H. J. Fust in his judgment relies upon the fact that the testator called the will of 1838 his last will, but that is

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"only one circumstance in conjunction with others upon which "he based his decision." In *Whitehead v. Jennings*, 1 Lee, 510, quoted by Sir G. Lee, a former will was held to be revoked by a later will appointing a different executor. The reason of that, no doubt, is derived from the civil law, the essence of a Roman testament consisting in the institution of an heir who took the whole of the testator's property; so that two wills could never subsist at the same time, as there could not be two distinct owners of the same property.

Sir C. CRESSWELL: There may be another reason why in some cases before 1 Will. IV. c. 40, the appointment of a different executor in a later will might operate as a revocation of an earlier. Before that, an executor was entitled to the undisposed residue of the testator's personal estate; but that Act provided that executors should be considered as trustees of the undisposed residue for the next of kin, unless it should appear by the will or codicil that the testator intended them to take beneficially.

Dr. Wambey also cited *Stoddart v. Grant*, 1 M'Qu. H. L. Cas. 163.

Dr. Spinks, contra: Probate should be granted of both scripts, and to both executors. The later will containing no clause of revocation, it does not revoke the former unless it is wholly inconsistent with it. There may be a difference without inconsistency. The second will is clearly not inconsistent with the first, for it disposes only of two houses, while the first disposes of all the real and personal property (*Richards v. The Queen's Proctor*, 1 Eccl. & Adm. 235). The appointment of a fresh executor does not operate as a revocation of the will, but both of them may take probate (*In the Goods of Matthew Leese*, 2 Swa. & Tr. 442). In that case executors were appointed by two testamentary instruments, each of

which purported to be the last will. In the earlier, L. R. and W. were named executors; in the later, D. and the same L. were named executors. The Court held that both scripts were entitled to probate, and that all the executors were entitled to prove. The only difference between that case and the present is, that here the later will appoints Geaves sole executor; but, as it limits that appointment by the words "to this my last will," it is hardly distinguishable.

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SIR C. CRESSWELL: I think that the two papers are not inconsistent, and that, therefore, both are entitled to probate, as together containing the will of the deceased. I have had some doubt whether probate should be granted to both executors, but I think the meaning of the testator is too doubtful to justify me in excluding either. They may, therefore, take probate jointly. I think the costs of both parties should come out of the estate.

MITCHELL AND MITCHELL v. GARD AND KINGWELL.

1862.

Will.—Residuary Legatee.—Instructions.—Legacies omitted.

May 15 & 27.

B. gave certain instructions to G. for her Will, of which she made him, G., residuary legatee. After the Will was drafted, B. said she wished to leave three other legacies, naming the legatees. G. said it should be attended to; but subsequently read over the Will to B. without adding such legacies, and B. signed it. On the trial of certain issues at Exeter, the jury found that deceased was of sound mind, and negatived undue influence; that B. had given the instructions for the further legacies; that at the time of execution they were absent from B.'s mind, but present to G.'s mind, who knew that they were absent from B.'s mind.

MITCHELL AND
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v.
GARD AND
KINGWELL.

Byles, J., thereupon directed a verdict on the issue, "Will or not Will of deceased," to be entered for the plaintiffs opposing the Will, with leave to G. to move to set aside. After argument,

1862. The Court held that the paper-writing so executed was the Will of the
May 15 & 27. deceased, and made the rule absolute to enter verdict for the de-
fendants on that issue.

MITCHELL AND
MITCHELL
v.
GARD AND
KINGWELL.

In this case the plaintiffs had called in the probate of the will of Mary Gregory, granted in common form, on the 18th of October, 1862, to the defendants, the executors therein named, who propounded the will. Certain issues were sent down from this Court for trial at the spring assizes for the county of Devon.

The questions for the jury, as settled by the registrar, were to the following effect:—1. Was the will duly executed according to the statute? 2. Was the deceased of unsound mind? 3. Whether or not the will was the will of the deceased? 4. Whether the execution thereof was procured by the undue influence and control of the defendant Gard?

The issues were tried at Exeter on the 14th and 16th of March, when a special jury found a verdict for the defendants on the first, second, and fourth issues. As to the third issue, the learned judge, Byles, J., put the following questions to the jury:—

“Do you think that instructions were given to insert, and did the testatrix intend that there should be inserted, as legatees, the names of Mrs. Gillard, Mrs. Perriam, and Mrs. Egg before the execution of the will?”

“Were those instructions in the memory of Mr. Gard when he procured the execution of the will?”

The jury answered these questions in the affirmative.

“Were the instructions absent from the deceased’s mind at the time of the execution, and was Mr. Gard aware of that, or did she execute the will under the erroneous belief that those legacies had been, or would be given, and did he know that?”

Foreman of the jury: “We apprehend they were absent from her mind and present to his.”

“Was he aware that they were absent from her mind?”

“ We think that he was aware.”

Verdict was entered for the plaintiffs on the third issue, with leave for the defendants to move; and for the defendants on the first, second, and fourth issues, with leave for plaintiffs to move on fourth issue.

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MITCHELL AND
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GARD AND
KINGWELL.

Mr. Karlake, Q.C. (Mr. H. T. Cole with him) now showed cause against a rule obtained by *Mr. Collier*, calling on the plaintiffs to show cause why a verdict should not be entered for defendants on the third issue. [SIR C. CRESSWELL read *Byles, J.*, note of the evidence given on the trial, which, for the present purpose, is sufficiently stated in the judgment.] And the learned counsel urged that, to entitle such a will in its entirety to probate, the person obtaining it being beneficial residuary legatee, must satisfy the Court or jury that it contained the whole mind of the testator at the time of execution. The testatrix must have intended, when she put her name to that paper, to give effect to the instructions which she had given, but the jury have found that a part of those instructions were intentionally omitted by *Mr. Gard*.

Mr. Collier, Q.C., Mr. Coleridge, Q.C. (Dr. Wambey and Mr. H. C. Lopes with them), argued in support of the rule. No question of fraud can arise on these pleadings. The finding of the jury as to the state of testatrix's mind is, that she intended to have given the legacies omitted; but the will without them was read over to her, a competent testatrix, undue influence negatived, and she signed the will as read. How can that state of facts be affected by the finding of the jury, that at the time of the execution *Mr. Gard* knew that the testatrix had given certain instructions, that they were not in her mind at the time, and that he did not remind her of them?

Cur. adv. vult.

SIR C. CRESSWELL gave the following judgment: In this

May 27.

1862. case the defendants propounded a will alleged to have been
May 15 & 27. made by Mary Gregory, widow. The plaintiffs pleaded—first,
MITCHELL AND that the will was not duly executed; secondly, that the de-
MITCHELL ceased was not of sound mind, memory, and understanding;
v. thirdly, that the paper-writing propounded was not the will
GARD AND of the deceased; fourthly, that the will was obtained by the
KINGWELL. undue influence of the defendant Gard.

Issues were joined on these pleas, and the cause came on for trial at the last assizes for Exeter, before Byles, J., when the jury found, first, that the will was duly executed; secondly, that the deceased was of sound mind, memory, and understanding; fourthly, that the will was not obtained by undue influence.

With regard to the third issue, the learned judge put certain questions to the jury suggested by the evidence, which, as far as that issue was affected, was as follows:—The testatrix, on Tuesday, the 16th of September, in the morning, gave to the defendant Gard instructions for her will. She named several persons who were to be legatees, and the sums to be given to them respectively, and she made Gard residuary legatee. Gard directed his son, who was in practice as an attorney, to prepare a will according to those instructions, and to do it quickly. The son, in his haste, omitted the name of Triplett as one of the legatees. In the afternoon, Gard, the residuary legatee, took the will to the house of the deceased, and was soon afterwards followed by two medical men. One or more of the legatees named in the will were there, and some conversation took place about two or three other persons, and deceased said that she wished them to have a legacy of £5 each. Gard made a memorandum of this, and said it should be attended to; but the will was not altered. Soon after this all persons, except the two Gards (father and son) and the medical men, left the room. Gard then read over the will slowly and carefully to the deceased; she attended to it, and expressed herself satisfied. Neither she nor

Gard noticed the omission of Triplett's name. The will was then duly executed by her, and attested by the medical men. The learned judge told the jury that an accidental and innocent deviation from instructions (as in the case of the legacy to Triplett) would not vitiate a will afterwards executed and rightly understood, or even executed by a competent testator; but, with reference to the omission of the other legacies, he asked the jury whether the instructions for them were present to Gard's mind at the time of the execution of the will, but absent from the mind of the testatrix, and he (Gard) knew them to be so; or whether the testatrix executed the will in the erroneous belief that those legacies had been given by the will, and Gard knew that she did so. The jury found that the testatrix had given instructions to Gard for legacies to Gillard, Perriam, and Egg; that at the time of the execution of the will those instructions were present to his mind; that they were absent from hers, and that he knew them to be so. The learned judge thereupon directed the verdict to be entered for the plaintiffs on the third issue, giving to the defendants leave to move to enter it in their favour. A rule *nisi* for that purpose having been granted, cause was shown against it on the 15th of May, when the cases of *Barry v. Butlin*, 2 Moo. P. C. 480; and *Mitchell v. Thomas*, 6 Moo. P. C. 137, were cited to show that when a person prepares a will by which he is largely benefited, and the capacity of the testator is at all doubtful, it is necessary to prove that instructions were given by the testator, or that the will was read over to him, or that by some other means he was fully acquainted with its contents.

Those cases have no bearing on the question now to be determined, for the testatrix gave instructions for all that was in the will; it was read over to her, and the jury found that she was of sound mind, memory, and understanding, which is not now disputed. The real question is, whether that which she heard read, and approved, and executed, is or is not her

1862.

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1862. will, because she forgot at the time that she had desired other
May 15 & 27. legacies to be given, which were not inserted. Before the
statute 1 Vict. c. 26, many wills were brought under the con-
sideration of the Prerogative Court, when it appeared that
they did not contain all that the testator intended. The cases
on the subject may be divided into two classes: one, where
there was on the face of the will, as executed, some ambiguity
or incongruity which indicated that something must have
been omitted by mistake, and in them evidence was received
of the testator's intention, and the omission supplied. The
other class was where there was nothing on the face of the
will to indicate that a mistake had been made, and the prin-
ciple of law applicable to them was very clearly stated by Sir
John Nicholl in *Bayldon v. Bayldon*, 3 Add. 232. He says:—
“Where a will has nothing doubtful or incongruous on the
“face of it, suggesting itself the probability of some casual error
“to account for this in the body of the will, extrinsic evidence
“of the testator having meant other than the will expresses is
“inadmissible, as the Court after and notwithstanding such
“evidence would still be bound to pronounce for the will.”
And again, in *Shadbolt v. Waugh*, 3 Hagg. 573, the same
learned judge, with reference to an alleged omission, said, “It
“may be possible that the non-insertion escaped his observa-
“tion when the will was read over, but that is not sufficient.”

The omission of the legacies therefore did not prevent the
will propounded from being the will of the deceased. There
is nothing to show that at the time when it was executed she
believed it to be other than it really was; as far as this ques-
tion is concerned, I think it makes no difference whether the
legacies were omitted by accident or intentionally, nor can it
make any difference that Gard remembered the legacies, and
knew that she had forgotten them. But also the will was
executed by her intending that it should be her will; if her
execution of it had been obtained by fraud, the case would be
different. The knowledge of Gard may raise a suspicion

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against him, but fraud was not pleaded, nor do I learn from the learned judge's notes that it was imputed, nor was any question put to the jury on the subject.

The point reserved must therefore be determined apart from any presumption of fraud, and on the authority of the cases cited, as well as the reason of the thing, I am of opinion that the writing propounded was the will of the testatrix, and that the rule for entering a verdict for the defendants on the third issue must be made absolute.

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May 15 and 27.
MITCHELL AND
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KINGWELL.

CHRISTMAS AND CHRISTMAS v. WHINYATES.

1863.
Jan. 15 and 27.

Will.—Codicil.—Cutting off Part of Will.—Partial Revocation.

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Where a will and codicil were in the testator's custody, and the will was found mutilated after his death, in the absence of evidence the presumption is, that it was mutilated by the testator after the execution of the codicil.

W. executed her will on two sheets of paper, signing her name, in the presence of three witnesses, at the foot of the first side of the second sheet, and again at the top of the second side of the same sheet. The attesting witnesses subscribed their names in her presence underneath her signature at the top of the second side of the second sheet. Her signature and that of the attesting witnesses also appeared at the bottom of the second, third, and fourth sides of the first sheet. Subsequently to the execution of the will she duly executed a codicil, which occupied the lower part of the second side of the second sheet, below the signatures of the witnesses to the will. The codicil commenced—"A codicil. Since writing this my will," etc. The last sentence of the last side of the first sheet was, "Five thousand pounds Three per Cent. Consols shall revert to the further purposes of my will, as follows in the second sheet of my will."

On the death of W. these two sheets were found, but part of the top of the second sheet had been cut off, including the testatrix's signature on the upper part of the second side, the names of the attesting

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witnesses being untouched. The dispositive part of the will, contained in the second sheet so cut, did not carry out the intention expressed at the end of the first sheet.

HELD, that in the absence of evidence the presumption was, that the will was mutilated after the execution of the codicil ;

That the will and codicil, when executed, formed one testament, which had been mutilated by cutting off a portion ; but that, from the manner in which it was cut, the preservation of the rest of the will and codicil, etc., the testatrix only intended to revoke so much of the will as was cut off.

This was an amicable suit to ascertain the effect of certain testamentary papers left by Letitia Whinyates, deceased.

The testator had left a will and one codicil. The will was contained on two separate papers ; the first part of it was written on four sides of a sheet of paper (referred to as No. 1), and the remainder on the first side of a paper (referred to as No. 2). The will was executed by the testatrix in the manner following :—She signed her name, in the presence of three witnesses, at the foot of the second, third, and fourth sides of paper No. 1, and the witnesses then attested each of the signatures. She then signed her name at the foot of the first side of paper No. 2, and again at the top of the second side of paper No. 2 ; and the three witnesses then subscribed their names in her presence, after her signature, at the top of the second side only of paper No. 2. Immediately under their names, at the top of the second side of paper No. 2, was written a short codicil, commencing, “ A Codicil. Since writing my will,” etc., which was also duly executed. After the death of the testatrix, the will and codicil, which had remained in her custody since their execution, were found in a tin box in two open envelopes ; the paper No. 1 in one, and the paper No. 2 in another of the envelopes. It was apparent that the top of No. 2 had been cut off, and with it the testatrix’s signature at the top of the second side. The signatures of the attesting witnesses however remained.

The plaintiffs propounded the will and codicil, and the defendant pleaded that after they were made the deceased destroyed them with the intention of revoking them. Issue was joined on this plea. The case came on for hearing before Sir C. Cresswell, without a jury, and witnesses were examined on both sides, whose evidence (with the further facts of the case) is given in the judgment.

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Jan. 15 and 27.

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The Queen's Advocate (Sir R. Phillimore, Q.C.), and *Mr. Douglas Brown*, for the defendant, contended that the will had been revoked by the testatrix by cutting it. Her signature at the top of the second side of paper No. 2 being the final one to the will, and that which the witnesses attested as such, was the one that gave it validity. (*In the goods of Thomas Gullan*, 1 Swab. & Tris. 23.) The presumption of law was that it was cut off by the testatrix. Then arose the following questions:—1. Was it cut off *animo cancellandi*? In the absence of evidence of intention the presumption would be that it was. There were papers of the deceased which if admissible in evidence might throw light upon her intention in cutting the will. In the envelope in which paper No. 2 was contained there was a slip of paper, with these words written on it by the deceased,—“The cutting of this sheet is by my own hand.” But according to the principles laid down in *Doe dem. Shallcross v. Palmer*, 16 Q. B. 747, and *Staines v. Stewart*, 2 Swab. and Trist. 320, they would be inadmissible, writings of the deceased coming within the same category as declarations. [SIR C. CRESSWELL: Yes; but if you can show an act done, that act will be evidence. Suppose a deceased left a letter, in which he said, “I tore up my will,” you could show that he had written the letter, but its contents could not be received as evidence of revocation.] 2. Was the will cut before or after the execution of the codicil? There is no evidence of the time when the act was done. In the absence of evidence the presumption is that

January 15.

1863. the excision of the signature was after the execution of the
 Jan. 15 and 27. codicil ; upon the same principle as it is held that unexecuted
 alterations in a will to which there is codicil are to be pre-
 CHRISTMAS
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 v.
 WHINYATES. sumed, in the absence of evidence, to have been made after
 the execution of the codicil. If so, and it was cut *animo
 revocandi*, it could not be revived by the codicil. [SIR C.
 CRESSWELL: You must show that the paper was cut.]
 The paper shows that upon the face of it. There is the
 paper stating that she cut the will herself, and others the
 intention with which she cut it. These papers would be
 tendered in evidence on behalf of the defendant. Suppose
 there had been a paper in the deceased's handwriting, stating
 that she had cut off the top of one sheet of her will in order
 to reduce it to the size of the other sheets, would not that be
 admissible? [SIR C. CRESSWELL: That would raise a very
 curious question, which I should like to hear argued. She
 would merely be stating that she had not cancelled her will.
 The effect of admitting that statement would neither be to
 make nor to revoke a will by parol. The declaration accom-
 panying the acts would be admissible.] The papers were then
 tendered in evidence, and witnesses examined for the defendant.

Dr. Deane, Q.C. (Mr. R. E. Turner with him), for the
 plaintiffs. 1. As the evidence stands, the last side of the will
 containing any disposition is the first side of paper No. 2.
 The will ended at the bottom of this side, and the signature at
 the end of this side is the signature at the foot or end of the
 will, and that which gives validity to it. The signature at the
 top of the second side of paper No. 2 was surplusage, and
 the fact that it was also seen by the witnesses is of no im-
 portance. 2. Supposing anything had been written at the top
 of the first side of paper No. 2, the revocation will be simply a
 revocation *pro tanto* of whatever was excised. The Wills Act,
 sec. 20, has provided for this kind of revocation. The preserva-
 tion of a part after the destruction of the other part of the will

affords a strong presumption that the testatrix only intended the will to be partially revoked. 3. Assuming the excision to have been made after the execution of the codicil, and that the signature excised was the signature which gave validity to the will, as the will was republished by the codicil, the will and codicil would form one instrument, whose validity would depend on the signature to the codicil, which was never cut, and not on the signature to the will.

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The Queen's Advocate in reply: In the absence of evidence it must be taken that nothing was written besides the signature upon the top of paper No. 2. The signature must have been cut off with some object. If it could not have been done to effect a partial revocation, it must have been done to revoke the will *in toto*.

Cur. adv. vult.

SIR C. CRESSWELL: The plaintiffs declared that Letitia Whinyates, spinster, deceased, made her will and codicil, the will bearing date the 28th of January, 1856, the codicil without date, and duly executed the same. The defendant pleaded that after the will and codicil were made, the deceased destroyed the same with the intention of revoking them. Issue was taken on this plea, and the case was heard before the Court without a jury on Thursday, January 15th, when it was proved that the deceased died at Weston-super-Mare on the 11th of January, 1862. The deceased had lived for some years at Cheltenham with her two sisters, and being about to leave Cheltenham for Weston-super-Mare in October, 1861, borrowed of one of her sisters a box for the purpose of depositing some papers in it; she locked the box and left it at Cheltenham, and took the key with her. After her death the box was opened, and in it were found two envelopes; one contained a paper now distinguished by the mark 1, the other containing other papers marked 2 and 5: these envelopes were not sealed or otherwise closed. Besides these papers the

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1863. box contained several others, which it is not necessary to notice particularly.
 Jan. 15 and 27.

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The paper marked (1), occupying the four sides of a sheet of paper, was as follows:—"Cheltenham, January 28th, 1856.
 "—I, Letitia Whinyates, spinster, of Cheltenham, in the county of Gloucestershire, do hereby make my last will and testament. I cancel a will I made in 1837, and had signed by three witnesses. When called hence, I desire to resign my soul, etc. I wish to have a plain and inexpensive funeral. My bankers are Messrs. Martin and Co., 68, Lombard Street, London. My fortune is vested in the Three per Cent. Consolidated Annuities. I appoint my sister, Octavia Christmas, of Whitfield, in the county of Waterford, to administer to my last will, and I request also my brother, Lieut.-General Edward Charles Whinyates, to join my sister in administering to the same, and also M. General Francis F. Whinyates to do the same, and bequeath to each brother £50. I give and bequeath four thousand pounds in the Three per Cent. Consols to my three unmarried sisters, to Amy Whinyates, to Rachel Whinyates, to Isabella Jane Whinyates, and for their sole use and benefit conjointly as long as they do live, and" [here at the bottom of the second side appeared the signature of the deceased and of three witnesses] "in the case of the demise of one or two of my sisters mentioned aforesaid, the survivors or the sole survivor shall enjoy the same unto the end of life. To my dear sister Octavia Christmas I give and bequeath one thousand pounds in the Three per Cent. Consols, to possess the same unto the end of her life. But in the case of her demise before that of such of my spinster sisters, one or more who may be living at such time, I will this sum to revert to them for their sole use and benefit." [Here, at bottom of the third side, the same signatures.] "But if in the providence of God my sister Octavia Christmas should survive my three unmarried sisters, then in that case the

“four thousand pounds left to my three spinster sisters I be- 1863.
 “queath the same to Octavia Christmas during the term of Jan. 15 and 27.
 “her life alone, and for her sole use and benefit as long as she
 “lives; after which I will that on her demise these two sums, CHRISTMAS
 “which, if united in her, will form five thousand pounds Three AND
 “per Cent. Consols, shall revert to the further purposes of CHRISTMAS
 “my will, as follows in the second sheet of my will.” [Here, v.
 at bottom of fourth side, the same signatures.] Paper No. WHINYATES.
 2, when found, was as follows:—“To Amy Octavia Whin-
 “yates five hundred pounds, and in case that Amy Octavia
 “Whinyates be married, or be about to be married, when this
 “bequest becomes hers, I will that the five hundred pounds
 “be properly and legally secured to her for her sole use and
 “benefit. To Reginald Chalmer, my godson, and the son of
 “my beloved niece Emily Chalmer, I bequeath five” [this
 word had apparently been originally written “five,” altered to
 “one,” and altered again to “five”] “hundred pounds in the
 “Three per Cent. Consols; one hundred and eighty-two
 “pounds three shillings and elevenpence, I leave to be divided,
 “at the time of my death, between the four daughters of my
 “late niece Emily Chalmer, of Larbert House, Stirlingshire.
 “My cameo brooches, mosaic necklace, bracelet and ear-
 “rings, and other trinkets, I wish to give to Amy Octavia
 “Whinyates, my niece, together with a pink topaz necklace,
 “cross, and trinkets given to me by my brother, General Ed-
 “ward C. Whinyates. Witness my hand, LETITIA WHIN-
 “YATES.” The above writing and signature occupied the
 first side of a single sheet of paper. A piece had apparently
 been cut off the whole breadth of the top of this sheet. On
 turning the sheet of paper, the signatures of the same three
 witnesses appeared. The paper had been unevenly cut, by
 which means the names of all the witnesses were left un-
 touched.

Sarah Garrison, formerly Compton, Sarah Tea, and Mary Dale, proved that they lived in the service of the deceased;

1863. that in the month of October, 1858, they were asked by her
 Jan. 15 and 27. to witness her signature; that they saw her sign paper 1 on
 the second, third, and fourth sides thereof, and signed their
 names as witnesses; that they also, at the same time, attested
 her signature to paper 2.; that her signature then appeared
 on the second side; that they saw her sign there, and also at
 the foot of the first side. They could not say whether the
 paper had then been cut, or whether anything was written
 above the signature of testatrix on the second side, for part of
 the paper was folded down so that they could not see it. Be-
 low the signatures of the witnesses, the following writing on
 the same paper appeared:—“(A Codicil.)—Since writing my
 “will I have received the ninth part of my brother, in Reduced
 “Three per Cents., Admiral Thomas Whinyates’ fortune. I
 “bequeath the same, namely, £302. 8s. 9d., to my four great-
 “nieces, the daughters of my late niece Emily Chalmer; to
 “Letitia Layard, £10. Witness my hand, LETITIA WHIN-
 “YATES.” This the deceased, on a subsequent occasion,
 signed in the presence of the same witnesses, and they at-
 tested it. The top of the paper was then folded, so that
 they could not see whether any part had or had not been
 cut off.

This paper, No. 2, when found in the box, had the appear-
 ance of having been cut at the top. The first sheet ends
 thus:—“Five thousand pounds Three per Cent. Consols shall
 “revert to the further purposes of my will, as follows in the
 “second sheet of my will.” One would therefore expect the
 second sheet to contain such provisions as the conclusion of
 the first sheet indicates that she was about to make. But in
 that respect it is left quite imperfect, supposing that sheet
 No. 2 never contained anything more than is now found in
 it. From the appearance of the paper, the want of complete-
 ness of the words now found in the second sheet to accomplish
 the intention indicated at the end of sheet 1, and the evidence
 of the witnesses as to deceased having signed paper 2 on the

second side, I am satisfied that the paper was cut after the signatures had been attached, and, as the paper was in the custody of the deceased, it must be presumed that she did it herself.

Three questions remain to be disposed of: When must she be presumed to have mutilated the paper? With what intention? And what is the legal effect of such a mutilation effected at such a time and with such intention?

Since the statute 1 Vict. c. 26, if alterations or interlineations appear on the face of a will, and the time when they were made cannot be proved, it is presumed that they were made after the execution of the will; and if a codicil to such will has been made, it is presumed that the alterations were made after the execution of the codicil. It seems to me that the same principle must be applied to the mutilation of a will, and finding that the will in this case has been mutilated by cutting off a portion and the signature of the testatrix, I must presume that this was done after the execution of the codicil, so that the execution of the codicil cannot re-establish the will in its present state. When the codicil was executed, the will and codicil formed one testament, which has been mutilated by cutting off a portion. But with what intention must the testatrix be presumed to have done this? Certainly with intent to revoke so much of the will as was cut off. But from the fact of the signature, which was written just above the names of the witnesses, having been cut off, it may be presumed that she intended to revoke the whole will. If that fact stood alone, I think that such a presumption would arise. But from the manner in which it has been cut, it seems that she carefully avoided cutting off any of the names of the attesting witnesses; and as they had seen her sign the will on the other side of that sheet, it is not improbable that she thought their names, if left, would give effect to that signature. The manner in which the paper was cut cannot be accounted for by supposing that she was anxious

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1863. to preserve the codicil alone, for the signature and attestation of that remain untouched; and I cannot but suppose that she was anxious to preserve the codicil, and more, that is, so much of the will as remained. Now by 1 Vict. c. 26, s. 20, it appears that a will or any part may be revoked by tearing or otherwise destroying the same (that is, a will or codicil, or any part thereof), with the intention of revoking the same. Presuming, therefore, that her intention to revoke did not extend to anything left on sheet 2, I hold that so much of the will as was cut off the second sheet was revoked, and no more. The residue and codicil remain, for, as the whole will was not revoked, the presumption that the codicil was revoked by the revocation of the will does not arise. And whatever might be the effect of cutting off the signature at the foot of the will if no codicil had ever been executed, it seems to me that it cannot destroy the effect of the due execution of the codicil to any greater extent than was intended by the testatrix. I decree probate of the will as it now stands and the codicil. Costs of all parties to come out of the estate.

April 21 and
May 5.

In the Goods of W. HAMMOND (deceased).

In the Goods of
W. HAMMOND.

Will.—Attestation.—Signature.—15 & 16 Vict. c. 24.

A testator wrote a codicil upon the first side of a half-sheet of foolscap folded in the middle, and at the bottom of the sheet were written the words, "For my signature and witnesses see next side." On the fourth side of the half-sheet, and, when it was unfolded, by the side of and on a level with the bottom of the codicil, were the signatures of the deceased and of two witnesses. The paper was folded when the witnesses signed their names, so that they could not see whether there was any writing on the first side of the half-sheet:

Held, on motion, that the codicil was not duly executed, as there

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was no evidence at all from which it could be presumed that anything had been written on the paper before the signatures were put there.

1863.

April 21 and
May 5.

Dr. Spinks moved for probate of the will, and of a paper purporting to be a codicil to the will of W. Hammond, deceased.

In the Goods of
W. HAMMOND.

The codicil was written upon one side of a half-sheet of foolscap folded in the middle, and at the bottom of it were the words, "for my signature and witnesses see next side." On the fourth side of the half-sheet, and on a level with the bottom of the codicil when the half-sheet was unfolded, were the signatures of the deceased and of the attesting witnesses. When the witnesses signed the paper was folded in the middle, so that they could not see whether there was any writing upon the first side. The case comes within the terms of Lord St. Leonards' Act, 15 & 16 Vict. c. 24, s. 1. [SIR C. CRESSWELL: Does it satisfy the first branch of that section? "Every will shall, so far only as regards the position of the signature of the testator, be deemed to be valid within the said enactment as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," etc. The question is, whether he signed that codicil? There is no evidence that there was any writing at all on the paper at the time when it was signed. If the case comes within the first branch of the section, then it is not to be affected by such and such enumerated circumstances.] It is unnecessary that the witnesses should see the writing, or know what it is they are signing. [SIR C. CRESSWELL: There is no *testimonium* clause; there is nothing to show that he signed it as his will.] From the fact of its being signed, and from the position of the signatures, it may be inferred upon the face of the paper that he intended to give effect to the document hidden from the witnesses. [SIR C.

1863.

April 21 and
May 5.In the Goods of
W. HAMMOND.

CRESSWELL: Is there any case where the witnesses have attested merely a signature without seeing any writing on that part of the paper? Ought not the witnesses to know that there is some writing of some sort upon the paper they are signing? My opinion is, that if there were evidence that there was any writing there at the time, the signature would be sufficient under Lord St. Leonards' Act.] Yes; but from the statement of the witnesses it is impossible to get any evidence on that question. In the absence of evidence, the presumption *omnia rite esse acta* prevails. [SIR C. CRESSWELL: I do not like to decide questions of this sort on motion. They are of great importance as precedents.]

Dr. Spinks asked that the question might be decided on motion, as the estate was small, and the parties did not wish to propound the codicil.

Cur. adv. vult.

May 5.

SIR C. CRESSWELL: The question raised by this motion was, whether the codicil was duly executed. It appeared by the affidavits of the two attesting witnesses that they were invited by the testator to witness his signature on a paper that appeared to them to be a blank. They saw no writing whatever on it, and the signature they witnessed was on the fourth side of a sheet of paper folded in the middle. On the first side of that sheet there now appears to be a codicil. The question is, whether it can be considered that the deceased executed, and that the witnesses attested his execution of that codicil. *Dr. Spinks* very ingeniously argued that upon the paper being opened the signature was at the side of the codicil, so that the case would come within Lord St. Leonards' Act. He said that it must be assumed from the aspect of the paper that the deceased intended to give effect to it as his codicil, and that the first branch of the clause being satisfied, the validity of the codicil could not be affected by the circumstance that the signature was on a side, or page, or other portion of the paper or

papers containing the codicil, wherever no clause or paragraph or disposing part of the codicil was written above the signature. I think that would be so, and the signature would be sufficient if I had any evidence at all that anything had been written on the paper before these signatures were put there. The case was compared in argument with that of a will consisting of several sheets, where there was no direct evidence of all the sheets having been present at the time of execution, and also of that of a will executed when the writing was covered over; but I find that in all those cases, from that before Lord Mansfield (*Bond v. Seawell*, 3 Burr. 1773) down to the present time, it has always been considered as a question of fact whether the different sheets of a will were present at the time of the execution, and there was always some evidence from which it could be presumed that something had been written before the signature. But this case is absolutely bare of all evidence whatever on that point. I think, therefore, that I ought not to grant probate of the codicil, and I reject the motion.

Motion rejected.

1863.

April 21 and
May 5.

In the Goods of
W. HAMMOND.

JENKINS v. GAISFORD AND THRING.

May 22 and
June 2.

In the Goods of JOHN JENKINS (deceased).

JENKINS

v.

GAISFORD AND
THRING.

In the Goods of
JOHN JENKINS.

*Will.—Execution.—Signature or Mark by Direction of
Testator.*

A testator, towards the end of his life, had his usual signature engraved, so that it might be stamped on letters and other documents requiring his signature. He made two codicils, each of which was so stamped with his name by another person in his presence and by his direction :

Held, a due execution of the codicils under the Statute of Wills.

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1863. John Jenkins, late of Botley Hall, in the county of South-
 May 22 and ampton, Esq., died on the 22nd of November, 1862, leaving
 June 2. a will, duly executed on the 14th of April, 1862, whereby he
 appointed his sister, Jane Gaisford, and his brother, Henry
 JENKINS Jenkins, executrix and executor. There were two codicils,
 v. dated respectively the 5th of November, 1862, and the 6th of
 GAISFORD AND THRING. November, 1862, and an affidavit made by Henry Atkins
 In the Goods of JOHN JENKINS. stated the manner in which they had been executed.

Henry Atkins deposed as follows:—"That I have for one
 "year and upwards during the lifetime of the said John
 "Jenkins, and up to the time of his death on the 22nd of
 "November last, acted as amanuensis to the said John Jenkins,
 "who had for a considerable time past much difficulty in
 "writing or signing his name; that the said John Jenkins,
 "some months previously to his death, had an engraving
 "made of his usual signature in order that the same might be
 "used to stamp or impress his signature to letters and other
 "documents, and that in his presence I have been in the habit
 "of affixing to letters and other documents and papers the
 "name of the said John Jenkins by means of the said stamp
 "or engraving; that I am one of the subscribing witnesses
 "to the first codicil to the will of the said John Jenkins now
 "produced and shown to me, the said codicil being written at
 "the foot of the said will, and bearing date the 5th of Novem-
 "ber, 1862; that the said codicil was executed by the said
 "testator on the day of the date thereof by my affixing or im-
 "pressing the signature of the said John Jenkins, in compli-
 "ance with his express orders and direction, at the foot or end
 "thereof by means of the said stamp or engraving as the same
 "now appears thereon, in the presence of the said John Jen-
 "kins and of Ann Budd, the other subscribing witness there-
 "to, both of us being present at the same time, and that
 "the said testator, after his signature had been affixed to
 "the said codicil as aforesaid, placed his hand on the said
 "codicil and acknowledged the signature as his own, and the

"said codicil to be a codicil to his last will, and requested me to attest the same, and I and the said Ann Budd thereupon attested and subscribed the said codicil in the presence of the said testator and of each other." The deponent then gave a similar description of the manner in which the testator's signature had been stamped upon the second codicil.

1863.

May 22 and
June 2.

JENKINS

v.
GAISFORD AND
THRING.
In the Goods of
JOHN JENKINS.

Dr. Spinks moved for probate of the will and two codicils.

SIR C. CRESSWELL refused to grant probate of the codicils on motion.

Henry Jenkins, the executor named in the will, thereupon propounded the will in a special declaration containing a statement of the above facts, and cited Mrs. Gaisford and Mrs. Thring, the sisters, and with himself the only next of kin, of the deceased. An appearance was given on behalf of Mrs. Gaisford, and a demurrer to the declaration filed and joinder in demurrer; but before the demurrer came on for argument Mrs. Gaisford died, and Mrs. Thring declined to take any steps in the matter.

The point was therefore argued *ex parte* by *Dr. Spinks* on the 22nd of May: By the 9th section of the Wills Act, a will is to be signed at the foot or end thereof by the testator, or by some other person in his presence or by his direction. I admit this is different from any decided case that I am aware of, but by analogy to decided cases it seems a good execution. The word "signed" in the section applies equally to the testator and to the other person acting by his direction; but in the case of the testator it has been decided that "signed" is equivalent to "marked;" and it has been further decided that the person signing by the direction of the testator may use his own name (*In the Goods of James Clark, deceased*, 2 Curt.

1863.

May 22 and
June 2.JENKINS
v.GAISFORD AND
THRING.In the Goods of
JOHN JENKINS.
June 2.

329). In the present case I submit that it is indifferent whether it is taken as a mark or a name; it seems, in fact, to be a mark representing a name—the use of pen and ink is not necessary.

Cur. adv. vult.

SIR C. CRESSWELL: I am of opinion that the codicils were duly executed so as to comply with the 1 Vict. c. 26, s. 9. It has been decided that a testator sufficiently signs by making his mark, and I think it was rightly contended that the word “signed” in that section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence or by his direction, and therefore a mark made by some other person under such circumstances must suffice. Now, whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a fac-simile of the whole name was impressed on the will instead of a mere mark or X. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator. In the case where it was held that sealing was not signing, the seals were not affixed by way of a signature.

February,
April, May 27,
and June 2.

CRISPIN v. DOGLIONI.

*Will.—Succession.—Authority of Court of Domicil.*CRISPIN
v.

DOGLIONI.

The judgment of the Court of the domicile of the deceased at time of death is binding on the Court of a foreign country in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties

are in issue in the foreign Court which have been decided by the Court of the domicil.

This was an interest suit (see *ante*, 44). The special jury found that the plaintiff was the natural son of Henry Crispin, deceased. The other points were argued before the Court itself in the beginning of Easter Term. *Cur. adv. vult.*

1863.

February,
April, May 27,
and June 2.

CRISPIN
v.
DOGLIONI.

May 27.

SIR C. CRESSWELL: This was an interest suit. A caveat having been entered in the personal estate and effects of Henry Crispin, late of Faro, in the kingdom of Portugal, deceased, was warned by Joze Cortes Crispin, described as the natural son of the said Henry Crispin, deceased, and the sole person beneficially entitled to the estate and effects of the deceased. An appearance was given for the defendant Maria Doglioni, of Faro in Portugal, widow, the sister and surviving residuary legatee named in the will of the deceased, dated the 25th of July, 1825, and at her instance the plaintiff was ordered to declare and propound his interest. The plaintiff originally declared to the effect as reported in 2 Sw. & Tr. 17. I did not think that the judgments of the Portuguese Court were so stated in the declaration as to conclude the questions raised in this Court. The declaration was afterwards amended, and the defendant then traversed all its averments. On the trial of the issue as to the parentage of the plaintiff, it was proved to the satisfaction of a special jury that the plaintiff was the natural son of Henry Crispin, deceased. The other questions raised by the pleadings came on for trial before the Court without a jury. It was proved that Henry Crispin was throughout his life domiciled in the kingdom of Portugal, and died domiciled there; that he died a bachelor, etc., as alleged. On the question whether Henry Crispin was noble or not, according to the law of Portugal, and whether he was a British and not a Portuguese subject, so as to form an argument that his succession must be regulated according to the law of England, and not according to the law of Portugal, a great deal of con-

1868.

February,
April, May 27,
and June 2.

CRISPIN
v.
DOGLIONI.

flicting testimony was given. It could not be disputed that such a suit was instituted, and such judgment given as alleged, or that the Court of First Instance at Faro had jurisdiction; but it was contended that the judgment ought not to be considered satisfactory, because the evidence before me showed that it was not in conformity with the Portuguese law, and that the facts of the case had not been correctly understood.

As usual in such cases, experts were examined on each side, who gave conflicting evidence as to the law of Portugal. They did not quote decided cases, and their evidence did not go beyond their opinion as to the true meaning of certain ordinances which were read in evidence. That such conflicting testimony should be given cannot be a matter of surprise to any one accustomed to legal proceedings. Very learned members of the legal profession in this country often entertain different opinions on points of law. Similar differences are found on the Bench, where the parties expressing them cannot be in any way biassed by the feelings of advocates; and even in the Court of last resort it sometimes happens that the law lords are not unanimous in favour of the successful party. The difficulty of arriving at a correct conclusion as to foreign law, at all times great, is much increased where experts are examined and give conflicting testimony, for the Court has no means of ascertaining the comparative merits and learning of the witnesses. This difficulty I have not now to encounter; for after consideration I have come to the conclusion that it does not belong to this Court to sit as a court of appeal from the Portuguese Courts. It is beyond dispute that Henry Crispin died domiciled in Portugal, and therefore the succession to his personal estate must be determined by the law of Portugal *Stanley v. Bernes*, 3 Hagg. 373, which related to the succession to an English subject domiciled in Portugal; *Bremer v. Freeman*, 10 Moo. P. C. 300, and many other cases). And the law of the domicile applies equally whether the party whose succession is in question dies testate or intestate. The law on

this subject has never been more clearly or more forcibly stated than by the present Lord Chancellor in the case of *Enohin v. Wylie*, 31 L. J. Ch. 402. His Lordship there says :—

“ I hold it to be now put beyond the possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy or intestacy belong to the Judge of the domicile. It is the right and duty of that Judge to constitute the personal representative of the deceased. To the Court of the domicile belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the Judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under a will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort.” To that Court the present plaintiff did resort, as alleged in his declaration. The very same points were then raised that have been put in issue in this Court. A judgment was then pronounced in favour of the plaintiff, and that was affirmed on appeal; first by the Court of Release, and again by the Superior Court at Lisbon. By that judgment it was decided that the plaintiff is entitled to the inheritance of the deceased Henry Crispin. By that judgment I feel that I am bound; he must therefore, in this Court, be admitted as a contradictor of a will alleged to have been made by the deceased.

1863.

February,
April, May 27,
and June 2.

CRISPIN

v.

DOGLIONI.

The Queen's Advocate, Sir R. J. Phillimore (Mr. Hannen with him), moved the Court to condemn the defendant in costs.

June 2.

Mr. M. Chambers, Q.C. (Dr. Spinks with him), contended that the enormous costs had been in great part caused by the erroneous mode in which the earlier stages of the plaintiff's

1863.

February,
April, May 27,
and June 2.

CRISPIN

v.

DOGLIONI.

case had been conducted. The question as to the effect of the Portuguese judgments might have been raised in demurrer. At all events it was a most extraordinary case, in which an interest unknown to the English law was alleged.

SIR C. CRESSWELL: I am of opinion that the case must follow the ordinary rule. As to the ingenious suggestion of a demurrer, I do not see how pleas which were a mere traverse of the averments of the declaration could be demurred to. The first great question, namely, of paternity, occupied the Court seven or eight working days, and I must say the impression on my mind was, that it was an undefended case; and the defendant, after her experience in Portugal, must have known that the plaintiff had at least been accepted as the son of the deceased. With reference to the other issues, the party who pleaded them is responsible for the costs caused by them.

Condemn the defendant in costs.

June 2.

In the Goods of LYDIA MATHIAS (deceased).

In the Goods of
LYDIA
MATHIAS.

Will.—Memorandum.—Codicil.—Incorporation.

M. executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853, and another in 1862, which amounted to a re-execution of the will. On her death the will and two codicils, and a paper headed "memorandum of trinkets referred to in my will," were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence when the will was signed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it:

HELD, that the re-execution of the will by the last codicil could not

make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate.

1863.

June 2.

In this case, Lydia Mathias died on the 30th of March, 1863, and, after her death, a will and two codicils, on the same sheet of paper, and a paper headed "memorandum of trinkets" referred to in my will 1847-8," containing a list of various trinkets, written in ink, with names of various persons in pencil against each article, in the deceased's handwriting, were found folded together and locked up in a portfolio.

In the Goods of
LYDIA
MATHIAS.

The will was headed "began February, 1847." Towards the end the following clause occurred:—"I request my trinkets may be divided as I shall direct in a small memorandum." The testimonium clause contained the date "15th day of March, 1848." The codicils bore date respectively the 8th of June, 1853, and the 22nd of July, 1862. There was no evidence to show that the memorandum was in existence at the date of the execution of the will, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, by which codicil the will would be made to speak as from that date. There was no reference to any memorandum in the codicil.

Dr. Swabey moved for probate.

SIR C. CRESSWELL: Assuming it as a fact that the memorandum was in existence before the date of the last codicil, can that entitle it to form part of the probate? There is nothing to show that the memorandum was in existence when the will was signed; it therefore formed no part of the will. How can the execution of the codicil, which is a re-execution of the will, make that to be a part of will which was no part of the will before, and the codicil contains no reference to the memorandum.

Dr. Middleton (amicus curiæ) referred to *The Goods of*

1863. *Hunt*, 2 Rob. 622, the side-note to which is,—“A testator by
June 2. “his will bequeathed articles of plate specified in schedules A.

In the Goods of
LYDIA
MATHIAS.

“and B., to be annexed to this document (his will) ; two such
“schedules marked A. and B. were found after his death,
“which it was sworn were not written when the will was exe-
“cuted, but were in existence prior to the execution of a sub-
“sequent codicil, in which no mention was made of the sche-
“dules.” Sir John Dodson is reported to have said,—“I
“know of no precise decision in point, still I think probate
“may pass with the schedule as prayed.”

SIR C. CRESSWELL : No reasons are stated for the decision
at which Sir John Dodson arrived, in the absence of which I
think those I have just stated must prevail. I do not think
the memorandum ought to form part of the probate.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

JAGO v. JAGO AND GRAHAM (on motion for a new trial).

1862.

November 11.

Verdict of Jury.—Mistake of Witness as to Date.—New Trial.

JAGO

v.
JAGO AND
GRAHAM.

On trial of issue of adultery, the jury found a verdict against the petitioner. On affidavit by a witness called on his behalf, that she had made a mistake in an important date in giving her evidence, the Court directed a new trial, the error, if there were one, being likely, in the opinion of the Court, to have disturbed the judgment and misled the minds of the jury.

This was originally a petition by a husband for dissolution of marriage by reason of the wife's adultery, which she denied. The co-respondent appeared, but did not answer. The issue of adultery was tried before the Judge Ordinary and a common jury on the 4th of July, 1862.

The evidence, so far as material to the present question, was to the following effect:—The respondent, who had been separated from her husband in June, 1861, subsequently lodged at the house of a Mrs. Bull, at Battersea. Lucy Bull stated that on the 17th of July, 1861, the respondent asked if she could have the parlour to herself, as she expected a friend. The witness went out in the evening, and on her return, about

1862. half-past ten at night, found a man in the parlour with respondent, who introduced him to the witness as Mr. Graham. November 11. There was no light in the room. In about half an hour after the man left, when Mrs. Jago said he had wanted to stay all night. Brown and his wife, who occupied a kitchen immediately below the parlour, stated that on the night of the 24th of September, 1861, they were in the kitchen from nine to eleven o'clock; that Mrs. Jago and some man, unknown to them, were in the parlour during that time. Their evidence went to show that adultery was then committed.

JAGO
v.
JAGO AND
GRAHAM.

At the close of petitioner's case, Sir F. Slade (Mr. Daly with him) obtained leave to amend the petition by striking out the charge of adultery with Graham, and alleging adultery with some person unknown.

Whilst Dr. Spinks, for the respondent, was commenting to the jury on the contradiction of dates in evidence, Lucy Bull exclaimed that she had made a mistake, and meant to speak of the 24th of September.

The case went to the jury, who, after deliberating for more than an hour, found a verdict for the respondent.

Mr. Searle for the co-respondent.

A rule *nisi* for a new trial was obtained on behalf of the petitioner upon affidavits, stating that Lucy Bull, one of the witnesses called to speak to an act of adultery between the respondent and co-respondent, had made a mistake in a date, by naming the 17th of July, 1861, as the day when a person, alleged to be the co-respondent, had visited the respondent, whereas in fact it was the 24th of September.

Dr. Spinks showed cause against the rule. The petitioner amended his petition after the supposed mistake had been made by the witness, and having elected to go to the jury upon the evidence of the witness, notwithstanding the mis-

take, he ought not to be allowed to take advantage of it for the purpose of obtaining a rehearing. The question was one entirely for the jury, depending upon the credibility of the witnesses, and their verdict ought not to be disturbed.

1862.

November 11.

JAGO

v.

JAGO AND
GRAHAM.

Mr. Daly supported the rule. The affidavits clearly proved that the witness was mistaken, and the mistake, and the amendment rendered necessary in consequence of it, were calculated to produce a great effect upon the jury. He cited *Richardson v. Fisher*, 1 Bing. 145; *Gethin v. Gethin*, 2 Swab. & Tris. 560; *Miller v. Miller and Hicks*, 2 Swab. & Tris. 427.

THE JUDGE ORDINARY: I am of opinion that the rule ought to be made absolute. If the witness did, as she deposed, make the mistake, it was clearly one of a most important character. It made all the difference between having the evidence of two other witnesses corroborated or contradicted by her. I cannot doubt that the variation between her testimony and that of the other witnesses produced a very serious effect on the mind of the jury. I should be very loath to disturb a verdict where I thought that the jury had applied their minds to the evidence, and the evidence had been laid before them without any mistake or misapprehension; but thinking that this is a matter of great importance, that the error, if there was one, was likely to disturb the judgment and mislead the mind of the jury, and having at present no reason to doubt that the young woman speaks the truth when she says she was mistaken, I shall make the rule absolute on payment of costs.

1862.

WEBSTER V. WEBSTER AND MITFORD.

November 25.

— —

WEBSTER

v.

WEBSTER AND
MITFORD.

*Dissolution at Petition of Husband—Wife's Life-Interest in
Settlement Moneys.—22 & 23 Vict. c. 61, s. 5.*

The Court will require full information of the husband's means when asked to vary the interest of the wife in her moneys in settlement in favour of the child. Where the marriage had been dissolved by reason of the wife's adultery, and she was entitled to a life-interest in a sum of about £2900 Consols, her own moneys in settlement, and the husband had scarce any income, the Court ordered the trustees of the settlement to pay £20 per annum out of the life-income of the respondent to the paternal grandfather of the only child of the marriage, a daughter, for her use and benefit.

This was an application to the Court under sect. 5 of 22 & 23 Vict. c. 61, to make an order with reference to the application of a portion of the respondent's life-income under her marriage-settlement. The petitioner, who was formerly a lieutenant in the 17th Regiment of Foot, had petitioned for a dissolution of his marriage on the ground of his wife's adultery with Captain Mitford, against whom he claimed £5000 damages.

On June 11, 1861, the cause came on for trial before the Judge Ordinary and a common jury. It appeared in the evidence at the trial, that the petitioner and the respondent were married when very young, and that they had not lived happily together, and that the respondent was a person of violent temper, and had on one occasion attempted to assault her husband with a poker, which facts were urged in mitigation of damages. The jury found that the respondent had been guilty of adultery with the co-respondent, and assessed damages at £5, and the Court made a decree *nisi* for a dissolution of the marriage, with costs against the co-respondent. The decree *nisi* was subsequently made absolute. The petitioner had filed a petition praying the Court to direct a por-

tion of the wife's life-interest under her marriage-settlement to be appropriated for the benefit of the only child of the marriage. It appeared by the petition that the husband had brought no property into settlement, but that the wife had brought into settlement £2487. 4s. 6d. Three per Cent. Consols, and £427. 5s. 9d. Three per Cents. Reduced; the dividend of which sums was settled upon the wife for life, the remainder to the husband for life, and on the death of the survivor of them the principal was to go to Ada Webster, the only child of the marriage, now about nine years old.

It was also stated in the petition that the petitioner had sold his commission, and that his own means were only small and not sufficient to enable him to maintain and educate the child in a manner suitable to her station in life. The wife had filed an answer to this petition, but not upon oath.

Dr. Tristram moved the Court to direct that a certain portion of the wife's life-income on her property in settlement should be applied for the benefit of the child.

Dr. Spinks for the wife: The Court has not sufficient information of the means of the petitioner to enable it to determine whether this is a case in which it ought to exercise its discretion to deprive the wife of part of her income. The husband in his petition gives a very vague account of his means; he may have ample means to support the child and himself.

Dr. Tristram: If further information is required as to the husband's means, he will file an affidavit as to that point.

THE JUDGE ORDINARY: I think the Court should be supplied with further information as to the husband's means before making an order. I will adjourn the case to enable him to file an affidavit containing the information required.

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November 25.
WEBSTER
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2. The husband afterwards filed an affidavit, in which it was
x 25. stated that in 1858 he was a lieutenant in the 17th Regiment
- of Foot, but it having come to the knowledge of his brother
- officers that his wife was living with Captain Mitford, who
AND was formerly in the same regiment, in consequence thereof
RD. he received so many annoyances, and his position in the regi-
ment became so uncomfortable, that he was induced to sell
his commission, and had realized by the sale £500; that he
had since made endeavours to get a partnership in mercantile
houses in Liverpool without success; that he had also been
an unsuccessful candidate for an adjutancy in a rifle corps;
that he had been out to Canada to endeavour to obtain an
appointment, but had failed to get one; that he had failed in
a farming speculation; that he had also made an unsuccessful
application to the War-Office for an appointment as barrack-
master; that he was then made a captain in a militia regi-
ment, but he was not called out, and that his intention was
to settle in Queensland, and to leave his child, who was now
at school in this country, under the care of his father Lieut.-
Colonel Webster and his mother; that he had no property
except the £500 realized by the sale of his commission, part
of which had been spent; and that he had realized £80 since
he sold out.

Dr. Tristram renewed the motion: The petitioner was
desirous that any sum allotted by the Court should be made
payable to his father for the benefit of the child. He cited
Bacon v. Bacon, 2 Swab. & Tris. 86.

Dr. Spinks, contra: The income of the respondent is only
enough to support her, but she is willing to take the child
and support it herself. The case of *Bacon v. Bacon* is very
different from the present one; in that case the wife was
proved to be living in incestuous adultery at the time of the
trial.

THE JUDGE ORDINARY: I think this is a case in which the respondent should contribute out of her life-income under the settlement a certain sum for the benefit of the child. I order £20 a year to be paid by the trustees of the settlement during the respondent's life, out of the dividends received by them on the settled property, to Lieut.-Colonel Webster for the benefit of the child.

1862.

November 25.

WEBSTER
v.
WEBSTER AND
MITFORD.

(Before the JUDGE ORDINARY, assisted by WILLIAMS, J., and
CHANNELL, B.)

1863.

January 22.

GLENNIE v. GLENNIE AND BOWLES.

GLENNIE
v.
GLENNIE AND
BOWLES.

*Husband's Suit for Dissolution.—Wife's Costs.—Power of
Court.—Practice.*

By sect. 51 of the Divorce Act, the Court which hears the suit has absolute authority over costs, and no appeal as to costs only lies. The settled practice of the Court is, that the wife, if she fails, will not be entitled to taxed costs beyond the sum of money paid into Court by the husband at the order of the registrar. In the present case the Court rejected a motion for an order on the husband to pay the balance of the wife's taxed costs above such sum of money paid into Court, and condemned the wife's solicitor in costs of the motion.

Quere, whether, if dissatisfied with the registrar's order, the wife's solicitor ought not then to have applied to the Judge Ordinary to vary such order.

If the respondent's counsel calls witnesses, the Court will expect him to open his own case and comment on the petitioner's evidence before he calls his own witnesses. If the co-respondent's counsel examines a witness called by the respondent, he can do so only by way of examination in chief, adopting the witness as his own.

This was an application arising out of a suit for dissolution of marriage, brought by the husband against the wife. The respondent denied the adultery, and pleaded connivance and

Griffin
collected 9

1863. condonation. The co-respondent denied the adultery, and
January 22. pleaded connivance. The issue joined was tried on the 6th
of November, 1862, by the Judge Ordinary, without a jury.
GLENNIE
v.
GLENNIE AND
BOWLES.

Mr. Karlake, Q.C., and Dr. Spinks, for the petitioner.

Mr. Huddleston, Q.C., and Mr. W. Murray, for the respondent.

The Queen's Advocate (Sir R. Phillimore), and *Dr. Wambey*,
for the co-respondent.

As may be seen by the note,¹ the Queen's Advocate adopted

¹ At the hearing the following points arose:—

Mr. Huddleston, at the close of the petitioner's case, said that he should call the respondent's witnesses at once, and should reserve his comments on the petitioner's evidence until he summed up his own.

THE JUDGE ORDINARY: I think you should comment on the petitioner's evidence now.

Mr. Huddleston: Cockburn, C. J., has laid down a different rule. There is a great difference of opinion amongst the judges on the point.

THE JUDGE ORDINARY: I think the rule laid down by Cockburn, C. J., only goes to this extent, that counsel, when they sum up their own evidence, may comment on that of the other side. I think that in summing up evidence counsel ought to confine themselves to their own evidence; but it is impossible for a judge to confine counsel within that limit, if they wish to escape from the rule. I cannot, however, permit a wilful abstinence from comment at the outset.

Mr. Huddleston accordingly opened the respondent's case, and commented on the petitioner's evidence.

The Queen's Advocate, after *Mr. Huddleston* had opened respondent's case, said that he should not call witnesses, and should reserve his speech until after the respondent's evidence had been given.

THE JUDGE ORDINARY: If you call no witnesses you cannot address the Court after the close of the respondent's case.

The Queen's Advocate said that he would then call witnesses. He then opened the co-respondent's case.

After the examination in chief of the respondent's first witness,—

the witnesses, or at least some of them, called on behalf of the respondent.

The Judge Ordinary decided all the issues in favour of the petitioner. The present application was to vary the decision of the registrar as to the wife's costs. When before the registrar to ascertain a sum of money to be paid or secured by the husband to meet the wife's costs of trial, her solicitor pointed out the nature of the case, and asked for £300. The registrar, in his discretion, ordered £150 to be paid or secured. The wife's costs, as taxed after the hearing, amounted to £225. The balance over the £150 remained unpaid to her solicitor, who now in fact prayed the Court to make an order on the husband, the petitioner, to pay the balance.

This motion had been set down to be heard by the Full Court, which had appointed its sitting for to-day. On the case being called,

THE JUDGE ORDINARY said: By the 51st section of the Divorce Act, the question of costs is in the absolute discretion of the Court which hears the case, and the section provides that there shall be no appeal on the subject of costs only. The learned judges who with me have to-day made the Full Court, disclaim any authority or jurisdiction in the matter; but, as they are present, are willing to help me with their advice.

The Queen's Advocate (Mr. W. Murray with him), for the respondent, admitted that the practice of the Court, if it was

The Queen's Advocate was about to ask the witness a question.

THE JUDGE ORDINARY: Do you adopt the witness as your witness?

The Queen's Advocate: I may examine her without adopting her as my witness.

THE JUDGE ORDINARY: You clearly cannot cross-examine her. If so, how can you examine her in chief unless she is your witness?

The Queen's Advocate then examined the witness as a witness for the co-respondent.

1863.

January 22.

GLENNIE

v.

GLENNIE AND
BOWLES.

1863. settled by the cases of *Starkie v. Starkie and Irvine*, 30 L. J.
 January 22. 118, and *Sopwith v. Sopwith*, 2 Sw. and Tr. 105, was against
 them; but contended that, if so, the practice should be re-
 vised. In this and similar cases the difficulty was caused by
 no fault or laches of the respondent's solicitor, but by a mis-
 carriage of the discretion of the registrar in directing a sum
 to be paid in or secured, which was less than the amount ulti-
 mately taxed. If that practice is to prevail, it would be im-
 possible for wives to get professional men to conduct their
 defence properly.

GLENNIE
 v.
 GLENNIE AND
 BOWLES.

Mr. Karlake, Q.C. (Dr. Spinks with him), for the peti-
 tioner: This is really an application to unsettle, for the benefit
 of respondent's attorney, the practice as settled by the Full
 Court in *Keats v. Keats and Montezuma*, 1 Sw. & Tr. 358,
 and acted upon constantly since. The attorney, if dissatisfied
 with the allotment of the registrar, might have appealed to
 the Judge Ordinary at the time (*Mason v. Pollen*, 2 Dow. Pr.
 Ca. 62; *Jones v. Jacob*, *ib.* 442). It is too late now. These
 are hard cases on the husband, for the co-respondent fights in
 fact under the shield of the respondent as to a large part of
 his costs.

THE JUDGE ORDINARY: Generally speaking, if any ob-
 jection is felt to what a registrar has done, the party objecting
 may bring the matter before the Court. My learned brothers
 decline, as members of the Court, to express any opinion;
 but, privately, they cannot advise me to disturb the rule. I
 have always considered the question of costs to be paid by the
 husband in these cases as one of great delicacy. In this case
 the witnesses called were treated as the witnesses of the co-
 respondent, as well as of the respondent. Perhaps, strictly,
 it would be proper only to tax half the expenses of such wit-
 nesses against the husband. At all events this motion must
 be rejected, and the respondent's attorney must pay the costs.

STONE v. STONE AND BROWNRIGG.

1862.

November 4.

*Practice.—Decree Absolute.—Affidavit of Search.—23 & 24
 Vict. c. 144, s. 7.*

STONE.
 v.

STONE AND
 BROWNRIGG.

The affidavit to found a motion to make absolute a decree *nisi* for dissolution of marriage, should show that search was made in the registry at a recent date. The Court refused to make a decree absolute on the 4th of November upon an affidavit of search on the 1st of October.

In this case, on the 14th of June, 1862, the Judge Ordinary pronounced a decree *nisi* for dissolution of marriage on the ground of the wife's adultery.

Dr. Swabey now moved the Court to make the decree *nisi* absolute upon an affidavit in the usual form, sworn on the 1st of October, 1862, which stated that upon that day search had been made in the registry, and that no appearance had been entered by any person in opposition to the decree *nisi*, and that the Queen's Proctor had not obtained leave to intervene.

THE JUDGE ORDINARY: The search is not sufficiently recent. A later search must be made, and the affidavit must be resworn.

Dr. Swabey, on the 11th of November, renewed the motion on an affidavit of search on the 6th of November.

THE JUDGE ORDINARY made the decree absolute.

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January 13 and
February 3.

HAVILAND v. HAVILAND.

*Alimony.—Voluntary Allowance to Husband.*HAVILAND
v.
HAVILAND.

The wife cannot include in her husband's income liable to alimony any purely voluntary allowance made to him; though possibly there might be circumstances under which the wife might be entitled to alimony out of income to which the husband might have no strict legal right.

This was a question arising on a petition for alimony *pendente lite*, viz. whether an allowance of £300 a year made to the husband by his mother was chargeable with alimony. His answer alleged that so much of his income was a free and voluntary gift from his mother, to which he had no right or title.

Dr. Wambey, in support of the petition for alimony, contended that great hardship might be caused where such an allowance formed the whole or the greater part of the husband's income.

Dr. Spinks contra: There is no authority or precedent for charging a merely voluntary gift with alimony.

Cur. adv. vult.

THE JUDGE ORDINARY: This was a petition for alimony *pendente lite*. The wife alleged, *inter alia*, that the husband received an allowance of £300 a year from his mother. The respondent, as to this, answered that what he received from his mother was a free and voluntary gift on her part, to which he had no right or title. It was argued for the petitioner, that she was entitled to alimony in proportion to her husband's actual income, although it might soon be diminished; in which event he might come to the Court and ask for a reduction of the alimony allotted. On the other hand, it was urged

that the money received by the husband as a free gift was no part of his faculties; that alimony must be awarded out of that which could be deemed his property, and not out of what might or might not be given to him. I inquired whether any case was known in which a voluntary gift by a parent had been considered part of the faculties of the son, but none such was known at the bar. Dr. Swabey has since kindly furnished me with a note¹ of a case decided by Dr. Wynne, afterwards Sir W. Wynne, in which he allowed alimony out of a voluntary gift by the father. I have had the papers looked up and find the case to have been as follows:—The allegation of faculties charged that the respondent was in partnership with his father, and received, as his share of the profits of the business, £200 per annum. The respondent answered that his name had been introduced into the firm by his father, but that there were no articles of partnership and no agreement that he should have any particular share of the profits. That his father had, on the commencement of this suit, struck his name out and allowed him, as a free gift, £200 per annum. It was contended for the respondent (one of his counsel being Dr. Scott, afterwards Lord Stowell) that no instance was known in which alimony had been allotted in respect of an eleemosynary gift, and no such case was cited on behalf of the wife. Dr. Wynne awarded alimony in respect of this £200, saying that the Court was, in some instances, obliged to judge of the husband's faculties according to appearances. From which I infer that he considered the alteration of the firm, and the alleged free gift of the £200 per annum, an attempt to evade the process of the Court. I have caused inquiry to be made and cannot learn that any instance is known in which alimony has been allotted out of that which was admitted to be a mere gratuitous and voluntary gift. If such had been understood to be the decision in the case mentioned, I cannot but think that the precedent would have been often followed,

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January 13 and
February 3.HAVILAND
v.
HAVILAND.

¹ See Vol. II. p. 657, *Mulo v. Mulo*, in note.

1863. for such cases must frequently have arisen. If it was so understood at the time, and no attempt has been made since to take advantage of the point so decided, I can only conclude that in the opinion of the profession the ruling could not be sustained. It seems to me that the argument by Dr. Scott in that case was well founded, and that I ought not to allot alimony in respect of the voluntary allowance made by the husband's mother in this case, but I do not mean to say that cases may not arise in which alimony may properly be awarded in respect of an annual income to which the husband has no strictly legal right. Without that sum the husband's income appears to be £800, and out of that I allot alimony at the rate of £160 per annum.

Jan. 21 and 22,
Feb. 10 and 17.

(Before the JUDGE ORDINARY.)

GIPPS v. GIPPS AND HUME.

GIPPS
v.
HUME.

Petition for Dissolution.—Connivance.—Practice.

In March, 1861, G. petitioned for dissolution by reason of his wife's adultery with H. An arrangement had previously been made that a sum of money, in lieu of costs and damages, should be paid by H. into the hands of a third person, to abide the result of the trial. In June, 1861, before the trial came on, G. signed a paper, by which he undertook, in consideration of the receipt of £3000 from H. as costs and damages, and upon H. securing to him the further sum of £4000, to withdraw his petition. It was found that the record could not be withdrawn, but on the jury being sworn no evidence was given, and a verdict was taken for the respondents. The parties failed to agree upon terms of a separation deed between G. and his wife, and H. refused to pay the £4000. In June, 1862, G. filed a petition for dissolution by reason of his wife's adultery with H. in and since August, 1861. H., among other things, pleaded connivance and conduct conducing to the adultery, and the Court held that the

bargain by H. to give up his legal remedy for the previous adultery for a sum of money, without stipulation as to his wife's future conduct, amounted, under all the circumstances, to consent and connivance in respect of the adultery now complained of, and dismissed the petition.

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Jan. 21 and 22,
Feb. 10 and 17.

GIPPS

v.

GIPPS AND
HUME.

After a cause has been heard, and before judgment given, the Court will not allow either party to introduce additional evidence except by the consent of the other party.

This was a petition for dissolution of marriage brought by the husband. The petition was filed on the 5th of June, 1862, and alleged the wife's adultery in and since the month of August, 1861, at divers places, with William Wentworth Fitzwilliam Hume, and the birth of twins, the fruit of that adultery, on or about the 4th of May, 1862. The answers of the respondent and co-respondent, filed in July, 1862, simply denied the adultery. The co-respondent, in December 1862, obtained leave, on condition that the cause should be withdrawn from a jury and heard by the Court itself, to amend his answer by pleading connivance, and that the said A. P. Gipps, by his wilful misconduct, had conduced to the adultery, if any; that heretofore, and before the committing the adultery in the said petition complained of, the said A. P. Gipps, having filed his petition in this honourable Court, alleging that the said respondent had committed adultery with the said co-respondent, and the said petition being about to be heard in this honourable Court, in consideration of the receipt of a large sum of money to be paid by the said co-respondent, with a full knowledge of all the circumstances of the case, agreed with the said co-respondent to withdraw his said petition then about to be heard in this honourable Court as aforesaid; that thereupon the said co-respondent paid the said A. P. Gipps a large sum of money, and afterwards, when the said petition came on to be heard in this honourable Court, the said A. P. Gipps refused to offer evidence in support of his said petition, and thereupon a verdict was found against the said A. P. Gipps.

1863. Issue was taken on connivance and misconduct conducting,

Jan. 21 and 22, etc.

Feb. 10 and 17.

The case was heard before the Judge Ordinary, on the 21st and 22nd of January.

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v.

GIPPS AND

HUME.

Serjeant Pigott and *Dr. Spinks* for the petitioner; *Dr. Tristram* for the respondent.

The *Queen's Advocate* (Sir R. Phillimore) and *Mr. Henry Lopes* for the co-respondent.

There was no doubt about the adultery.

Mr. Evans, petitioner's solicitor, said :—" I was solicitor " for petitioner in the first suit in this matter. I arranged " with Mr. Halliwell, a friend of petitioner and respondent, for " payment of money by Mr. Hume. I went to see him at " Mr. Gipps's house in the end of February, 1861, at Mr. " Gipps's desire. Mr. Halliwell proposed £3000 to be paid into " his hands by Mr. Hume, to abide the result of the petition " which I had been instructed to present against Mrs. Gipps " and Mr. Hume. The £3000 was for costs and damages; no " other damages to be claimed in the petition. It was under- " stood Mr. Hume would go as far as £3000. Mr. Gipps was " present. I presented the petition, and the proceedings went " on regularly up to the hearing, which was likely to take " place on the 18th of June, 1861; the case was called on " the 20th. On the morning of the 18th, Mr. Halliwell and " Mr. Gipps came to my office. Mr. Gipps instructed me to " agree to a compromise of the suit on the terms contained in " a written document, which they brought with them; but he " objected to certain stipulations as to a deed of separation " between his wife and himself, on the ground that Mr. Hume " should not interfere between his wife and himself as to the " terms of any separation. That part was struck out before " Mr. Gipps signed the paper. As signed, the paper was in " the following terms :—

“ ‘ In the matter of *Gipps v. Gipps and Hume*.

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“ ‘ In consideration of the receipt of £3000 from the co-respondent as my costs and damages, and upon the said co-respondent securing to me the further sum of £4000, to be paid upon the death of his mother, he in the meantime paying to me, or as I may direct, interest on the said sum of £4000 after the rate of 5 per cent. per annum, I, with the full knowledge of all the circumstances, undertake to withdraw my suit now about to be heard in the Divorce Court. Dated this 18th day of June, 1861.

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“ ‘ PEMBERTON GIPPS.

“ ‘ Witness, J. T.’

“ I afterwards saw Mr. Ade, Mr. Hume’s solicitor. He wished the record withdrawn that day. I said I did not know if that was practicable; but that I would do so if possible. I thought the cause might be called on for trial, and then we should give no evidence. He said, ‘Withdraw the record, if possible, as we desire to avoid publicity.’ I instructed counsel to make the motion to withdraw the record; it was unsuccessful, as the other counsel were not present. The motion was renewed, but Mrs. Gipps’s counsel objected; there had been a negotiation with Messrs. Broughton and White, Mrs. Gipps’s solicitors, who would not consent to withdraw the record unless terms of separation were then acceded to; the terms he asked I objected to, but said that Mr. Gipps had no objection to make an allowance to his wife during good behaviour. I had stipulated that Mrs. Gipps’s costs should be paid by the co-respondent. When the cause was called on the jury were sworn, but no evidence was offered, and the verdict was taken for the respondent.”

[A long correspondence between the solicitors as to a deed of separation and giving effect to the terms of compromise, which had been read, was then proved, but it was not material to the point decided by the judgment.]

“ On behalf of Mr. Gipps I did not receive the £4000 from

1863. " Mr. Hume; I asked for a bond, but did not get it. I was
 Jan. 21 and 22, " told that I had not complied with the agreement to with-
 Feb. 10 and 17. " draw the record. I filed a bill for specific performance,
 GIPPS " a demurrer to which was allowed by Vice-Chancellor
 v. " Wood."
 GIPPS AND HUME.

On cross-examination, Mr. Evans, amongst other things,
 " said :—" Mr. Gipps received the £3000 in two parts; £600
 " I cannot exactly say when, a considerable sum before the
 " cause came on for hearing on signing the agreement to
 " withdraw: he has never returned any part of that £3000.
 " The bill for specific performance was filed in August, 1861,
 " the demurrer was allowed on the 15th of November, 1861.
 " I received instructions to proceed in this petition in May,
 " 1862, after the birth of the children. After the verdict in
 " June, 1861, Mr. Gipps did not know where his wife was till
 " October or November, 1861; a detective was then employed.
 " After that I don't think that Mr. Gipps pressed for the bond
 " for £4000."
Cur. adv. vult.

February 10. *Dr. Spinks* moved, on an affidavit of Mr. Evans, to put in a
 letter, part of the correspondence between the solicitors above
 mentioned, dated 19th of July, 1861, which, as Mr. Evans
 stated, having been addressed to Mr. Ade personally, and not
 to the firm " Clutton and Ade," had been overlooked, and not
 proved and put in at the hearing.

The Queen's Advocate (Mr. H. Lopes with him) contra.

THE JUDGE ORDINARY: I understand that in the Eccle-
 siastical Courts the judge had the power of rescinding the
 conclusion of the cause, if he thought it essential to the ends
 of justice; but could either party bring in documents after
 the hearing? It seems to me impossible to admit this letter
 now, as I am asked to do it, without consent. If the letter
 is introduced, there should be something in the nature of a

rehearing, an opportunity of asking the witness questions, perhaps of bringing in fresh evidence.

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After some further discussion the Queen's Advocate withdrew his opposition, and the letter was taken by consent as part of the correspondence put in at the hearing.

—
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THE JUDGE ORDINARY delivered judgment. This was a petition for dissolution of marriage on the ground of adultery. The respondent by her answer denied the adultery. The co-respondent denied the adultery, and pleaded connivance and misconduct conducing to the adultery.

February 17.

The case was heard before me, without a jury, on the 21st of January last, when it was proved on behalf of the petitioner, that in October, 1861, and afterwards, the respondent and co-respondent committed adultery. It also appeared in evidence that in 1861 the petitioner had filed a petition against the respondent and co-respondent, praying for a dissolution of his marriage on the ground of adultery, which they by their answers had denied. Before this petition in 1861 was filed, a meeting took place at the petitioner's house between him and his then and present attorney and a Mr. Halliwell, a friend of both petitioner and respondent, who then proposed that £3000 should be paid by Mr. Hume to Mr. Halliwell, to abide the result of the suit, and that it should be in lieu of costs and damages, and that the petition should not contain any claim for damages. The petition was accordingly filed in that form, and afterwards the sum of £3000 was paid over to the petitioner. I may as well observe here that this was as like a petition filed by collusion as could well be; but that is of no consequence now. The cause was appointed for trial by a jury on the 18th of June, 1861. On that morning, Halliwell produced the following document, signed by the co-respondent [the Court here read a counterpart of the agreement set out above]. The petitioner agreed to the terms, except the passage as to terms of separation, which was struck out, and

1863. signed a corresponding document. Now this agreement was
Jan. 21 and 22, very remarkable: the £3000 was to be paid for costs and
Feb. 10 and 17. damages; what further demand had the petitioner? for what
consideration was the sum of £4000 to be paid? It was to
be paid for the withdrawal of the suit. Having accepted a
satisfaction for costs and damages, he had no further right to
enforce against the co-respondent; the only right that re-
mained to him was, that of complaining of his wife's adultery
and claiming his legal remedy, viz. a dissolution of his mar-
riage. The £4000 must have been intended as the purchase-
money of that right, and for that sum the husband covenanted
to shut his eyes and no longer see the infidelity of which his
wife had been guilty. He did not condone the offence by re-
suming cohabitation; he did not then make any stipulation
respecting her future conduct, nor any provision for her main-
tenance, but simply agreed to withdraw the suit and so forego
his right to complain. The cause was called on for trial on
the 20th of June. The petitioner asked leave to withdraw
the record; the respondent's counsel objected, the jury were
sworn, and the petitioner, in order to fulfil his agreement,
offered no evidence, and thereupon a verdict was necessarily
found for the respondent and co-respondent. Afterwards a
negotiation took place between the petitioner and respondent
and their respective attorneys respecting a deed of separation
and the allowance to be made to her. The parties differed as
to the sum to be allowed, and then the co-respondent refused
to give a bond according to his agreement unless it contained
a stipulation that the interest at £5 per cent. should be paid
to the wife, and the bond held in trust for her separate use in
case she survived his mother, on whose death the principal
sum would become payable. The petitioner, in August, 1861,
filed a petition against the co-respondent for a specific per-
formance of his agreement, to which he demurred (*Gipps v.*
Hume). The petitioner then employed a detective officer to
inquire after the respondent, and ascertain how and where she

was living. In October he was informed by the person so employed that she had been at the Southwick Hotel in London, and there had been visited by the co-respondent. The question in the equity suit was argued on the 15th of November, when the demurrer was allowed.

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The question upon this evidence is not whether the parties to the bargain, both or either, have disgraced themselves by the course that they have pursued, but whether the plea of connivance has been established; or, in other words, if a husband, finding that his wife has committed adultery, foregoes his claim to divorce in consideration of a sum of money, not condoning the offence, but allowing her to remain his wife, and his remedy to be barred by a verdict in favour of the respondent and co-respondent, without making any stipulation as to the future conduct of the parties, does he or does he not show himself so regardless of his own and her honour that he must be taken to give a tacit consent to any future intercourse between her and her paramour.

The Court is not without high authority on this point. It seems to me that a man so acting withdraws his objection to the intercourse that has taken place; his conduct is almost equivalent to selling his assent to such intercourse; he wilfully closes his eyes then, and his position is very much the same as if he had wilfully closed his eyes before the suit was commenced. Under such circumstances the judgment of Lord Stowell, in *Lovering v. Lovering*, 3 Hagg. 87, seems applicable:—"Can a man consenting to adultery with A., but not consenting to adultery with B., take advantage of that adultery, and say to the Ecclesiastical Court, *non omnibus dormio*? This is language not to be endured." If he cannot say "*non omnibus dormio*," can he say "*non semper dormio*?" Again, in *Crewe v. Crewe*, 3 Hagg. 133, his Lordship says:—"I come to the next head of objection, viz. connivance or toleration for other purposes, and this is the part of the case which presses with most force. By toleration, I mean that

1863. "passive sufferance of adultery for a length of time which

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"in law enures to a waiver of the legal remedy." Surely this case is stronger: here was no passive sufferance, but an active bargain to tolerate what had passed in consideration of money, without making any stipulation for the future. Can the petitioner divide his wife's adulterous connection with Mr. Hume into two portions, and say,—So much I have tolerated, for that I have received compensation, and have consented that my remedy shall be barred, but *non semper dormio*; for the residue I will claim a dissolution of my marriage? If he could not say so with reference to different paramours, can he with reference to the same? If the petitioner, when the first suit was commenced, having ascertained the criminal intercourse that existed between his wife and Mr. Hume, had taken no step either to put an end to it or to obtain the redress that the law allowed him, could he, on account of the continuation or renewal of that intercourse at a subsequent time, have maintained a suit? That, as it seems to me, would be directly in contravention of Lord Stowell's judgment in *Crewe v. Crewe*. Is it possible to hold that he is in a better position because, being acquainted with his wife's infidelity in 1860, he did not altogether close his eyes, but accepted a pecuniary compensation for it; or, in other words, because he did not altogether waive his legal remedy, but sold it? I apprehend not, and that the opinion of that eminent judge is directly applicable to this case.

Then can he maintain the suit because the bargain made in the former suit has not been fulfilled. It is no part of my duty to express an opinion as to the conduct of a person who forfeits his word and refuses to fulfil such a bargain as that made by Mr. Hume. Whatever may be thought of him, his refusal does not relieve the petitioner from the discredit attaching to the maker of such a bargain. He never repented of the bargain,—he did all he could to enforce it, even after he had obtained information from which he could not but

infer that the intercourse between his wife and Mr. Hume still continued. Had that bargain been fulfilled, I believe I should never have heard of this suit; but, however that may be, I think it is one where the conduct of the petitioner has amounted to connivance or consent to her intercourse with Mr. Hume, and that the petition must be dismissed.

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During the discussion it was remarked that in one of the letters that passed respecting the terms of a deed of separation, the petitioner offered to make a certain allowance to his wife, to be continued so long only as she led a virtuous life. He had made no stipulation of that nature as a condition for allowing the suit to fail for want of evidence, and I fear that the passage referred to was rather for the purpose of protecting his own purse than to secure the future good conduct of the respondent. For the reasons assigned, my decree is that the petition be dismissed.¹

¹ The decree, as originally worded in this case, was as follows:—

“The Judge Ordinary having deliberated, by his final decree dismissed the petition, for dissolution of marriage of the petitioner with the respondent, filed in this cause.” February 17.

On settling a case for appeal to the House of Lords, on behalf of the petitioner, it seemed doubtful whether the above decree would sufficiently bring all the circumstances of the case before their Lordships; and the Judge Ordinary, on motion of counsel for the petitioner, opposed by counsel for the co-respondent, varied the terms of the decree as follows:—

“The Judge Ordinary having heard counsel on behalf of the petitioner and co-respondent respectively, ordered, on the application of the counsel for the petitioner, that the final decree made in this cause on the 17th of February, 1863, be altered, and that the said decree, as altered, be as follows:— May 5.

“*February 17th, 1863.*—The Judge Ordinary having deliberated, was of opinion that Helen Etough Gipps, the respondent, had committed adultery with William Wentworth Fitzwilliam Hume, the co-respondent; but that Augustus Pemberton Gipps, the petitioner, had connived at such adultery. Whereupon the Judge Ordinary, *aforesaid*, by his final decree, dismissed the petition filed by the said Augustus Pemberton Gipps, praying for the dissolution of his marriage with the said Helen Etough Gipps.”

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February 17.

COOKE

r.
COOKE.

(Before the JUDGE ORDINARY.)

COOKE v. COOKE.

Judicial Separation.—Cruelty.—Condonation.—Lapse of Time.
—Agreement as to Children—Matthews v. Matthews,¹
distinguished.

From 1851 to January, 1855, a wife received great cruelty at the hands of her husband; besides acts of personal violence, he excluded her from the head of his table, and from the management of the household. On various occasions between January, 1855, and September, 1856, the wife left and returned to her husband's house; but after January, 1855, refused to return to her husband's bedroom, unless she were replaced in her proper position in the household, which the husband refused to do. In September, 1856, she left, and did not return to her husband's house. In September, 1857, an arrangement was made, through the medium of friends, that she should pay to her husband a portion of income settled to her separate use, and that he should allow the children from time to time to visit her. She paid the money, but in the early part of 1862 three years had elapsed since the husband had allowed any of the children to visit her, and he then refused to do so, though she was very ill. In July, 1862, she petitioned for judicial separation; the answer of the husband denied the cruelty, and alleged condonation and undue delay.

The Court held, that the wife's return to the house showed a willingness to condone; but that she annexed, as she had a right to do, a condition precedent, with which the husband never complied; therefore there was no condonation so as to bar her suit for judicial separation; but that, if there had been, the husband's conduct and demeanour whilst she remained in the house would have sufficed to revive the gross acts of cruelty; less being sufficient to destroy condonation than to found an original suit.

That the whole of the transactions subsequent to the wife leaving the house in September, 1856, grew out of and were connected with the misconduct of the husband, and raised no suspicion that the suit was brought in 1862 with any other object than to obtain that legal protection to which the wife was entitled.

Undue delay in bringing the suit is no plea, strictly speaking, to a petition for judicial separation.

¹ 1 Swab. & Trist. 440; 3 Swab. & Trist. 161; and 29 L. J. 120.

This was the wife's petition for judicial separation by reason of cruelty. 1863.

February 17.

Dr. Spinks and *Mr. J. P. Murphy* conducted the petitioner's case.

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The Queen's Advocate (Sir R. Phillimore) and *Mr. Aspland* for the respondent. *Cur. adv. vult.*

The circumstances of this case, which is reported only as to the question of condonation and of delay in bringing the suit, as bearing on the *bona fides* of the petition, are sufficiently stated in the judgment.

THE JUDGE ORDINARY: This was a suit for judicial separation on the ground of cruelty.

The petition alleged several gross acts of personal injury inflicted by the respondent, and, in addition, that on many occasions he used gross and insulting language towards her; that, in 1854, the respondent, to insult and annoy petitioner, forced her to give up the housekeeping to her eldest daughter, then only sixteen years of age; that he locked her out of her bedroom, and afterwards compelled her to live in a separate room, by day and night, for a fortnight; that, in May, 1855, when petitioner returned from visiting some friends, he again forced her to occupy a separate bedroom, and a few days afterwards rudely drove her upstairs, and obliged her to live in her bedroom for six weeks; that, in September, 1855, the respondent, to insult and annoy her, again compelled her to leave her place at the head of the table, and never again allowed her to resume it; and that, in December, 1855, she was ordered by her husband to move all her clothes into a miserable little room on the back-stairs, which had been a man-servant's room, and she was compelled to sleep there and make it her bedroom; that, in February, 1856, petitioner, without any apparent cause, was driven away from the breakfast-table by the respondent, and ordered by him to live up-

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stairs again; that, in March, 1856, whilst sitting at tea, in the presence of the family and a gentleman, a friend of respondent's, he declared he would not have petitioner in the room, and endeavoured to pull the chair from under her; that, in September, 1856, being unable to bear longer the continued ill-treatment and insult to which she was subjected, petitioner finally left respondent's house and went to reside with her sister (now Mrs. Mayo), and has ever since resided with her; that, at that time, petitioner forbore to institute proceedings against respondent, who, in consideration of petitioner giving up a portion of her own settled income for her children, agreed to allow them to visit petitioner from time to time; that petitioner has always fulfilled her part of the agreement, but that respondent, in 1862, although she was dangerously ill, refused to let her children visit her.

The respondent, in his answer, denied that he had committed the acts of personal violence, or used the language imputed in the petition, and alleged that if he did use any such language, it was reasonably caused, and in answer to provoking and irritating language and demeanour of petitioner (there was not much evidence of abusive language used by the respondent, and none of any provoking and irritating language used by petitioner); that the petitioner's housekeeping and management were negligent and improper, so much so that it became necessary, for the comfort of respondent and his family, that the housekeeping should be taken from her; wherefore, and not on purpose to insult and annoy her, respondent did take the housekeeping from her as alleged (the charges of negligence and mismanagement made by the respondent in his evidence were of the most frivolous description); that as to keeping her out of her bedroom, and compelling her to sleep and live in a separate room, she did it voluntarily and of her own accord; and the same answer was given to the second charge of the same kind; that as to requiring her to leave the head of the table in 1855, she had

used insulting and irritating language to respondent in the presence of members of his family, and to put an end to that, and prevent its recurrence, and not to insult or annoy her, he did require her to leave and stay away from the head of the table (there was no evidence to support this assertion); that, on the occasion mentioned in February, 1856, she used irritating and provoking language to respondent in presence of some of their children, wherefore he reasonably required her to leave the room (there was no evidence to support this); that she left respondent's house voluntarily, and it was not caused or rendered necessary by the cruelty or ill-treatment of respondent; that respondent allowed the children to visit the petitioner, in accordance with the agreement between them, until the respondent discovered (as the fact was) that petitioner had encouraged one of respondent's children in habits of dissipation and disobedience to respondent (there was not any evidence of this); that petitioner had condoned the ill-treatment (if any) alleged in the petition; that petitioner (if otherwise entitled to maintain her petition) has been guilty of unreasonable delay in presenting the same.

The petitioner, in reply, denied all the allegations in the answer.

The cause was heard on the 30th of January. Some facts in the history of the parties were not disputed, viz. that they were married on the 9th of April, 1834, and had eleven children, of whom nine are now living, the eldest twenty-five years of age, the youngest twelve. For a good many years they had lived happily together, but in 1851 a change took place. As to subsequent transactions . . . (The learned judge here went at some length into the evidence given at the trial; in conclusion, he felt no doubt on the question of cruelty, and as the only points worthy of notice are the questions of condonation and delay, as bearing on the motives of the petitioner in bringing the suit, it is not necessary to detail this. It appeared that after January, 1855, she never returned to the respondent's

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1863. bed, and in the end of August, or beginning of September,
February 17. 1856, left the respondent's house and never returned to it;
COOKE the circumstances of the parties since January, 1855, are
v. stated at some length in the latter part of the judgment.) . . .
COOKE. After her departure some communications took place between
Mr. Wilde and Mr. Josselyn respecting an arrangement for
their living apart. The petitioner was entitled to a sum of
£6600 for her separate use, which was secured by a mortgage
on the respondent's property, and he insisted that some part
of the interest, amounting to one per cent. on the sum secured,
should be allowed by her towards the maintenance of the
children; and in September, 1857, the following letter was
addressed by Mr. Josselyn to Mr. Wilde, and by him handed
to the petitioner:—"Ipswich, September 15, 1857. Dear
" Sir,—I have seen Mr. Cooke to-day on the subject of our
" correspondence, and, in addition to what I have before pro-
" posed, he authorizes me to say that the one per cent. should
" be given by Mrs. Cooke amongst the children, or such of
" them and in such proportions as she pleases, but not to give
" more than £20 a year to any one child, and to send Mr.
" Cooke an account of the distribution, to enable him to regu-
" late his money arrangements with the children accordingly.
" That the children shall, from time to time, but not one
" child to the exclusion of the others, be allowed to visit Mrs.
" Cooke where she may be residing, provided such residence
" be not with Mr. or Mrs. Richards, and provided that no
" personal visiting or intercourse takes place between the
" children and Mr. or Mrs. Richards; the time of their (the
" children's) visits to Mrs. Cooke being so arranged as to
" meet Mr. Cooke's convenience and the general comfort of
" the children. I am, dear Sir, yours truly, George Josselyn.
" To S. F. T. Wilde, Esq., Hadley, Barnet." The petitioner
returned it with this indorsement:—"I agree to the terms
" and conditions contained in the above letter, and promise to
" abide by them. F. J. Cooke."

No agreement was ever executed, but from that time the petitioner regularly paid the one per cent., and in 1858-9 the respondent allowed some of the children to visit her, but afterwards refused, and in 1861 she addressed the following letter to Mr. Josselyn, who communicated it to Mr. Cooke, and then wrote to the petitioner stating Mr. Cooke's determination:—"Yarmouth, I. W., July 9th, 1861. Dear Mr. Josselyn,—I am sorry to be obliged to trouble you by writing, but I cannot help asking you to help me in a matter I have very much at heart. I want you to use your influence with Mr. C., and try and persuade him to change his mind and send a different answer to Lady Symonds's invitation to my three daughters. She wrote to him about a week ago, and kindly asked them all three to come and stay here as soon as convenient to him. She has this morning received his answer, in which he says, he 'cannot let them go,' without assigning any reason. I do not like writing to Mr. C. myself, but I should be very thankful to you if you would remind him of the terms of the agreement which was made by you and Mr. Wilde between me and my husband in September, 1857, in which these words are used, 'that the 'children shall, from time to time, be allowed to visit Mrs. 'Cooke,' etc. etc. Since this agreement was drawn up, in 1857, my three daughters have each been allowed to come and stay here only once, though my sister has invited them several times. I have regularly performed my part of the agreement as to paying back the one per cent. of the interest which I receive half-yearly, and I have also strictly complied with Mr. Cooke's wishes in preventing my children from meeting their uncle and aunt Richards, and I think that my husband ought to think himself equally bound to fulfil his part. I think it is a great pity that he should refuse his daughters the pleasure and advantage of a visit to their aunt this summer, especially as Bessie has not been very well lately, and change of air would certainly be good for her, to

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1863. "say nothing of the happiness which it would give them and
 February 17. "me to meet again. Do, dear Mr. Josselyn, try what you
 COOKE "can do to make him alter his determination and accept my
 v. "sister's kind invitation for our children. I have always
 COOKE. "paid for all the journeys of my children when they have
 "come to see me, so that it is no expense to their father.
 "Once more apologizing for writing to you on this subject,
 "and hoping that you will have the kindness to urge my
 "request, I remain, etc., F. J. Cooke." "Dear Mrs. Cooke,—
 "It fortunately happens that I am going to Semer to-morrow,
 "when I will do what I can to accomplish your wishes.
 "Yours very truly, George Josselyn. July 10, 1861. Mrs.
 "Cooke." "Dear Mrs. Cooke,—I placed your letter in Mr.
 "Cooke's hands yesterday; he read it, but held out no hope
 "to me that he would comply with your request. Yours very
 "truly, George Josselyn. Alresford Hall, July 12, 1861.
 "Mrs. Cooke."

Early in 1862, Lady Symonds had married Dr. Mayo, and
 in February of that year the petitioner was staying with Dr.
 and Mrs. Mayo, at their residence in London, and Mrs. Mayo
 then addressed the following letter to the respondent:—
 "Dear Mr. Cooke,—I write to you to entreat you to allow
 "Bessie and Frances to come here at once to see their mother,
 "who is, I fear, very ill. You remember that you promised
 "that my sister should see her children 'from time to time,'
 "and it is now three years or more since she has seen Bessie
 "and Frances. Her present precarious state makes it of
 "great consequence that she should have the comfort of see-
 "ing them, and I cannot think that under these circum-
 "stances you will refuse to grant my request. My urgent
 "reason for writing to you to-day is, that last night my sister
 "had a new and very important symptom of her pulmonary
 "affection, namely, a shivering fit. Yours sincerely, S.M. Mayo.
 "February 26, Wednesday." And received the following
 answer:—"Semer, Ipswich; February 28, 1862. Dear Mrs.

" Mayo,—I am sorry to hear Mrs. Cooke is unwell, I hope
 " she will soon be better. I cannot allow Bessie and Frances
 " to go and see her. The reason why I did not let them go
 " as bridesmaids at your wedding was that they should not
 " come in company with Mrs. Cooke. James still keeps his
 " bed. You state, 'you remember that you promised that my
 " 'sister should see her children from time to time;' there
 " can be no mistake about that, because I had it put on paper.
 " I am yours sincerely, James Y. Cooke. To Mrs. Mayo."
 On the 1st of March, Dr. Mayo wrote to the respondent as
 follows:—"56, Wimpole Street, 1st of March, 1862. Dear
 " Sir,—I am obliged to you for the letter with which you have
 " favoured Mrs. Mayo in answer to her request that you will
 " allow the Miss Cookes to see their mother in her present
 " dangerous state. For though you do not grant this point,
 " your letter throws light upon the measures which must be
 " adopted in order to obtain that which you refuse. Your
 " letter places you in the following position:—In the same
 " page you refuse to permit your daughters to see their mother
 " in her state of danger, not having seen her for nearly three
 " years; and you admit to Mrs. Mayo that 'you had promised
 " 'to do so from time to time.' You have also received pecu-
 " niary advances from your wife in consideration of this pro-
 " mise. It is for you to reflect gravely on the view which the
 " law may take of this procedure on your part. With the
 " most anxious wish to consult your interests as well as your
 " wife's, I shall take an opinion on the point. Believe me,
 " yours faithfully, Thomas Mayo." And the respondent
 merely acknowledged the receipt. On the 8th of May, 1862,
 the respondent wrote the following letter to the petitioner:—
 " Semer, Ipswich, 8th of May, 1862. Madam,—James is
 " now pronounced by Mr. Grower to be in health, although he
 " is still a little lame. You have been the means of causing
 " this protracted case, and it is the most fortunate thing he
 " was not crippled for life. The medical bills and travelling

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1863. "expenses amount to £35. 0s. 6d., which I must call upon
 February 17. "you to pay. James has tried to impose on the sick fund,
 COOKE "but I prevented it; what he has done in that way previous
 v. "to his coming home I must refer the party to you for repay-
 COOKE. "ment. James Y. Cook. To Mrs. Cooke. Send the cheque
 "at once and have the bills settled." To which Dr. Mayo
 replied as follows:—"Sir,—Mrs. Cooke duly received your
 "letter of the 8th of May, but was at that time too ill to
 "enter upon the disagreeable topic which it brought before
 "her; namely, your demand that she should pay the expenses
 "of children whom she was not allowed by you freely to see.
 "I now beg to inform you that she declines to submit to
 "your demand, as contained in your first letter, of £35. To
 "the letter of the treasurer of the sick fund at Newcastle she
 "has already replied. I am, Sir, your obedient servant,
 "Thomas Mayo. P.S. I enclose a copy of the letter written
 "by Mrs. Cooke to the treasurer of the sick fund." On the
 9th of June the respondent wrote to Dr. Mayo, enclosing a
 letter for the petitioner:—"Semer, Ipswich, 9th of June,
 "1862. Sir,—I addressed a letter to Mrs. Cooke at your
 "residence about a month since, to which I have had no
 "reply. If Mrs. Cooke is not residing with you I request
 "that the enclosed may be forwarded to her. I am, Sir, your
 "obedient servant, James Y. Cooke. Dr. Mayo." "Semer,
 "Ipswich, January 9th, 1862. Madam,—I want the money
 "for those medical bills for Jemmie, and I want to know
 "whether you have paid back to the sick fund at Stephenson's.
 "James Y. Cooke. To Mrs. Cooke."

In July, 1862, the suit was commenced, and the petitioner admitted that she should not have instituted it had there been no dispute about seeing the children according to the agreement, and that she is not in fear of her husband coming and beating her now, and has not considered such acts of violence probable since she left his house. . . . The respondent also put in evidence several letters written by the petitioner since the

separation, with what particular object I know not, unless to show that she addressed him as Dear James, and sometimes subscribed herself his affectionate wife; he certainly cannot be accused of writing to her in a similar strain. . . . As to the acts which I take to have been proved, there is no nice or doubtful question whether they amount to what the law calls cruelty—in my judgment they establish cruelty of a very aggravated and unmanly character; but it may be asked, if the story of the petitioner and her witnesses be true, why did she not bring forward her charges before Mr. Wilde and Mr. Josselyn? It seems to me that this silence is very easily accounted for: those two gentlemen met for the purpose of effecting a reconciliation; the wife was willing to be reconciled if restored to her proper position as a wife at the head of her table, and in the management of household affairs; would the object in view have been advanced by exposing to them the cruel personal injuries that had been inflicted upon her? Assuredly not, and I can well understand that a lady who contemplated remaining in her husband's house would shrink from making known to any person the grievous indignity to which she had been subjected.

The next question the Court has to deal with is that of condonation. Did the wife condone the acts complained of? It is unnecessary to go further back than the 28th of January, 1855; it appears by the evidence that the wife on that night returned to her husband's room, but that it was not voluntarily, it was in consequence of his violently insisting upon it in such a manner that the daughters feared for her life, and as soon as practicable she left her home. I cannot treat that sort of forced cohabitation as proving condonation. In *Popkin v. Popkin*, 1 Hagg. Sup. 768 (*note*), the last act of cruelty alleged was in December, 1790, and the wife quitted cohabitation on the 6th of January, 1791, and Lord Stowell considered that it was soon enough to repel the suggestion of condonation. But she returned to her husband's house on the 12th of May,

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1863. and remained there till the month of March in the following
February 17. year. Her voluntary return shows at least a willingness to
condone; but was that absolute or conditional? The petitioner states, and in this she was not contradicted, that she refused to return to her husband's bed unless she was reinstated in all respects in the position that a wife should occupy. Now, on her return a separate bedroom was prepared for her, and although she was for a short time allowed to take her meals with the family, she was not allowed to sit at the head of the table, or to interfere in the management of the household, and towards the end of May, in consequence of some imputed interference, she was compelled to live entirely upstairs. In the month of June Mr. Wilde and Mr. Josselyn met, and for some time afterwards she was better treated, and allowed to sit at the head of the table, but not to interfere in the management of the house; and in September, upon some alleged interference by giving some trifling order, the respondent directed a small bedroom, which had formerly been occupied by a man-servant, to be prepared for her, and there she slept, occupying the spare room by day, until she left home on the 26th of March, for the following reason:—On the 25th a gentleman came to visit the respondent, and as the spare room was wanted for him, she went downstairs to dinner. In the evening, when she was preparing to make tea, the guest being then present, the respondent came up to her, and ordered her to retire, for he would not have her there; and taking hold of her chair, shook it so violently, that if she had not moved she must have been thrown down. Next morning she told him she would not stay in the house to be subjected to such insults, and he sent her to Hadley in his dog-cart, whence she travelled by railway to London, and went to stay with her sister, Lady Symonds, who had then become a widow. It seems to me that there never was any perfect condonation; it was in her power to grant or refuse it, and as she annexed a condition to her offer to condone, which was

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never complied with, I think there never was condonation that could be pleaded as an answer to her suit. In *D'Aguiar v. D'Aguiar*, 1 Hagg. Sup. 782, Lord Stowell seemed to think that a return to matrimonial cohabitation was necessary to a complete forgiveness; and in *Snow v. Snow*, 2 N. C. 16, Sup., Dr. Lushington intimates a similar opinion; here there was no such return proved, nor was there any ground for presuming it; the contrary was clearly established. But if there had been, I think his subsequent conduct was sufficiently threatening to revive the offences condoned; for, according to *Wilson v. Wilson*, 6 N. C. 291; and 6 Moo. P. C. 484; *D'Aguiar v. D'Aguiar*, and many other cases, much less is sufficient to destroy condonation than to found an original suit.

On the 26th of August she returned again to her husband's house. When they met he would not shake hands, and she found every bed occupied, and therefore slept in her daughter's room. Next day he said he would not allow that, and then she slept in Miss White's room; he objected to that, and then, as the little room was vacant, it was prepared for her; but he said she should not sleep there, and ordered the sheets to be taken off; but she slept there without any. He then said that if she lived there she should return to his room, but she refused unless she was treated as a wife, and restored to her proper position downstairs, and in the management of the house. He then became very insulting, and called the servants to hear him find fault with her, and said that her conduct and management were such that he would not bear it any longer. On the following Sunday he burst into the little room where she was dressing to go to church, and said that he would not allow her to have that room any longer; to which she replied that she should only require it one night more; and would then leave his house, which she accordingly did, and never returned. This last return to her husband's house again shows that she was willing, and in effect offered, to condone; but she annexed a condition precedent which he

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1863. would not perform, and as he refused even to shake hands
February 17. with her, and again treated her with contumely in the presence of her servants, I think she was fully justified in thinking that cohabitation with him would be unsafe. I am therefore of opinion that, on this occasion, there was no perfect condonation, and even if her return to the house could be so considered, she had sufficient reason for leaving it again.

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COOKE.

The last plea of the respondent remains to be considered, viz. that the petitioner had been guilty of unreasonable delay in presenting her petition. The plea seems to be founded on the 31st section of the Divorce Act, 20 & 21 Vict. c. 105, which applies to suits for dissolution of marriage, and not to suits for judicial separation; and in this suit, strictly speaking, it is no plea. Mere lapse of time is not of itself a bar to the suit, but it may be offered as a circumstance to be taken into consideration, and, combined with others, may be a sufficient reason for dismissing such a petition. In this case it was relied on in connection with the petitioner's avowal that, but for the refusal to let her see her children, she should not have instituted the suit, and that, when living apart from her husband, she was not afraid of personal violence; and *Matthews v. Matthews*,¹ 1 Swab. and Trist. 449, and 29 L. J. 118, was cited as an authority for dismissing the petition.

That case, having been decided on appeal, must give the law to this Court until it has been overruled by some competent authority. The learned judges who gave judgment in that case appear to have arrived at the conclusion that the wife was not sincere in asserting that she feared her husband's violence; and that opinion was founded on the weakness of the evidence of personal injury, the lapse of time, and an apparent pecuniary motive for the proceeding, which induced them to think that the Court was asked to pronounce a sentence of judicial separation, not on account of any evil felt resulting from a habit of cruelty, but with a view to some other

¹ Also 3 Swab. & Trist. 360.

object having no relation to it. In the case now before the Court there can be no doubt as to the charge of cruelty; no doubt that, as long as the husband manifested the same want of affection, and the same determination not to allow her the proper position of a wife in his house, she could not safely cohabit with him; no doubt that she left him in consequence of his cruelty. True, she abstained, for reasons that may well be imagined, from bringing her wrongs before the public, and was content to submit to the separation, so rendered necessary, provided he would allow her the consolation of having sometimes the society of her children. That consolation was afterwards withdrawn; she could no longer have it unless she returned to cohabitation with her husband. No part of his conduct or his letters since the separation evinced any more kindly feeling towards her; and, therefore, I believe she was sincerely afraid of further violence, and, in order to obtain that to which, as a wife and a mother, she was entitled, and which she could only have by returning to a cohabitation that was dangerous, or by an appeal to this Court, she adopted the latter course. I find in all this no symptom of a scheme to promote or assist any purpose that has no relation to the ill-treatment that she has suffered and the peril to be encountered by a renewal of cohabitation. It appears to me, therefore, that the case of *Matthews v. Matthews* is plainly distinguishable from the present, and that I am bound to pronounce the decree prayed for.

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REEVES v. REEVES.

Cruelty.—One Act of Cruelty.—No Cohabitation.

Where one act of violence is of such a character as to found a reasonable apprehension of further violence in case of cohabitation, the wife is entitled to the protection of a matrimonial Court.

1862.
Nov. 14 and 25.
REEVES
v.
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1862. This was the wife's petition for dissolution on the ground
Nov. 14 and 25. of adultery coupled with cruelty. No appearance had been
entered for the respondent.

REEVES

v.

REEVES.

Dr. Spinks conducted the petitioner's case.

The marriage took place at Shrewsbury, on the 17th of December, 1860. The adultery was proved. The following was the evidence as to the cruelty:—

Mrs. Reeves, the petitioner, examined:—I was a widow before the marriage. I became acquainted with Reeves, who was a soldier in the Artillery at Woolwich, in September, 1860. I bought his discharge. On the day after the first night of the marriage I left him at Shrewsbury. I had no money left, and it was his wish that I should come to London to get some. He told me he would come up by New Year's Day, and I was to send him some money when I got home. I did send him money. The next time I saw him was on the 12th of January, 1861, near Shrewsbury. I sent into a public house for him, and waited outside. He came out, used very violent language, and asked me what I had come down for. I said I had come to see what he was doing, as he required so much money from me. He asked me whether I had any money to give him then. I said I was surprised at his asking me for more after what he had had. He began swearing at me, and said he did not want me and he did not consider I was his wife. He then attempted to strike me, and I avoided the blow; and then he gave me a kick in the leg. I ran away, and he went back into the public house. In February, 1861, I was in the Elephant Inn, at Shrewsbury, and I saw him come in with two females. He would not say anything to me. In November, 1861 (this was subsequent to the service of the citation), I met him in the street in London. He said to me, "Holloa! you are the very person I want. I am glad to see you. I want some money." I said I would

not have anything to say to him ; and I begged him to go away. He then said he knew I had money, and he wanted some. I went away, and he followed ; as I was going to cross the road he came in front of me, caught hold of my two shoulders, and pushed me down on the kerbstone. A crowd collected, and he got into a cab and went away. Another witness proved that Mrs. Reeves had a wound on her leg just after the marriage.

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Nov. 14 and 25.

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There was ample evidence of the adultery.

THE JUDGE ORDINARY : I have some doubts as to the cruelty.

Cur. adv. vult.

THE JUDGE ORDINARY : This was a sort of case which I hope is not very common. A widow, whose husband had left her some property, married a young man whose discharge from the army she purchased, and she was grossly ill-used by him on the only two occasions when they came together after the marriage. The second of these occasions was after the petition was presented, and cannot therefore be taken into account. The first act was one of very gross ill-usage, and, from the habits and general conduct of the man, I cannot but think she would be in great danger of ill-usage if she lived with him. The case, therefore, is one in which a decree for divorce *à mensa et thoro* for cruelty would have been granted by the Ecclesiastical Courts. It has been laid down that where one gross act of cruelty is of such a nature as to raise a reasonable apprehension of further acts of the same kind, the Court will grant relief.

November 25.

Decree nisi granted, with costs.

1862.

MACCANN v. MACCANN.

November 25.

Evidence.—Communication between Attorney and Client.

MACCANN
v.
MACCANN.

In a suit by a wife for judicial separation on the ground of cruelty, the wife was asked, in cross-examination, whether she had not originally instructed her attorney to institute a suit for restitution of conjugal rights. The question was objected to, and the objection was overruled.

This was the wife's petition for judicial separation on the ground of cruelty.

Plea, a denial of the charge.

The Queen's Advocate (Sir Robert Phillimore) and *Dr. Swabey* for the petitioner.

Dr. Spinks for the respondent.

The petitioner was cross-examined by *Dr. Spinks*, and was asked, "Did you instruct your solicitor to institute a suit for "restitution of conjugal rights?"

The Queen's Advocate objected.—It was a confidential communication between the attorney and client on the subject of this suit, and was therefore privileged.

THE JUDGE ORDINARY: Does the privilege extend to the client as well as to the attorney when the client himself is in the box? It is not a communication with reference to this suit, but with reference to a suit of a different kind.

Dr. Spinks: The client cannot claim the privilege when under cross-examination.

THE JUDGE ORDINARY: I cannot think the privilege extends to a case like this; the question must be answered.

The objection was accordingly overruled, and the question put.

WITT v. WITT AND KLINDWORTH.

1862.

December 13.

Evidence.—Statements of Patient to Medical Man.

Statements in writing by a patient to a medical man, describing the symptoms of the illness upon which the medical man has advised the patient, are not admissible in evidence.

WITT
v.
WITT AND
KLINDWORTH.

This was the husband's petition for a decree of dissolution on the ground of adultery. The respondent pleaded, *inter alia*, a denial of the charge. The issues came on for trial before the Judge Ordinary and a common jury.

Mr. Hawkins, Q.C., and *Mr. D. D. Keane* for the petitioner.

Mr. Karlake, Q.C., and *Dr. Tristram* for the respondent.

The Queen's Advocate (Sir R. Phillimore) and *Mr. Holl* for the co-respondent.

Mr. Karlake called *Mr. Clover*, the respondent's medical attendant, who said that the respondent had gone to Tunbridge Wells by his advice on account of her health, and that whilst she was at Tunbridge Wells he had received letters from her. In consequence of those letters he had sent her prescriptions and medicines.

Mr. Karlake proposed to have the letters read.

Mr. Hawkins objected.

Mr. Karlake: The statements of a sick person to a medical man are evidence. Upon the same principle, the letters in which a patient describes her symptoms should be admitted.

1862. A deaf and dumb patient suffering from an internal malady
December 18. would be obliged to describe his symptoms in writing.

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v.
WITT AND
KLINDWORTH.

THE JUDGE ORDINARY: I shall not set a precedent for the admission of written communications to a medical man. The subject was much considered in *Aveson v. Lord Kinnaird*, 6 East, 188, and the limit is stated by Mr. Pitt Taylor as follows:—"The representations by a sick person of the nature and effects of the malady under which he is labouring, are receivable as original evidence, whether they be made to the medical attendant or to any other person, though the former are naturally entitled to greater weight than the latter, inasmuch as a physician is far more capable than a man unacquainted with the symptoms of diseases of forming a correct judgment respecting the accuracy of the statements." ('Taylor on Evidence,' part 2, c. 7, s. 518.)

The evidence was accordingly excluded.

May 20 and
June 3.

FORSTER v. FORSTER AND BERRIDGE.

FORSTER
v.
FORSTER AND
BERRIDGE.

*Entry of Appearance.—Effect of an Absolute Appearance.—
Plea to Jurisdiction of Court.—Practice.*

A respondent in a suit for dissolution of marriage having entered an absolute appearance, cannot afterwards plead to the jurisdiction of the Court, nor can she raise such objection by act on petition.

If a respondent intends to plead to the jurisdiction of the Court, she should appear under protest.

Semble, however, that at the hearing she may, notwithstanding, object to the jurisdiction.

This was a petition filed by Major Forster, of Her Majesty's Indian Army, for a dissolution of his marriage with his wife, on the ground of adultery committed with the co-respondent in

London, while the petitioner was engaged on military duty in India. It was alleged in the petition that the parties were married in India in 1839; that since their marriage they had generally cohabited in India, and that the petitioner had come from India to England for the express purpose of instituting this suit. The respondent and co-respondent had appeared absolutely by their attorneys to the citation, and on the 16th of April, before the time for putting in an answer to the petition had elapsed, the respondent took out a summons before the Judge Ordinary in chambers, calling on the petitioner to show cause why she should not be at liberty to amend the appearance entered for her, and make an appearance under protest. The co-respondent took out a similar summons. At the hearing of the summonses, *Mr. H. F. Gibbons* appeared for the petitioner, and *Mr. W. G. Harrison* for the respondent, and *Dr. Spinks* for the co-respondent. An affidavit was filed on behalf of the respondent, deposing that she was not aware of her position until after the absolute appearance was entered, and that as since the appearance was entered she had been advised that the petitioner and herself having been born in India, the Court had no jurisdiction to dissolve the marriage solemnized in India, she sought to be allowed to appear under protest, so as to raise the question of the jurisdiction of the Court to entertain the suit. An affidavit was also filed by the co-respondent and his solicitor, from which it appeared that when the appearance was entered on his behalf, neither of them was aware that the marriage was celebrated in India, and that both the parties had been born, and had been always domiciled in India. The Judge Ordinary, however, dismissed both summonses. Afterwards the co-respondent put in his answer, denying the adultery. On the 2nd of May, time having been granted for the purpose, the respondent put in the following answer:—"The respondent, Mary Owen Forster, answers to the petition and citation of the said William Robert Forster as follows; that is to say, the

1862.

May 20 and
June 8.

FORSTER

v.

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“ respondent *in her own proper person* comes and says that
“ the Court hath no jurisdiction in the matter of this suit, and
“ ought not to have or take further cognizance thereof, because
“ she says that before and at the time of the alleged occurring
“ of the several matters in the petition and hereinafter men-
“ tioned, the petitioner was, and still is, domiciled in India, and
“ not within the realm of England or within the jurisdiction
“ of this Court. That his domicil of origin was India. That
“ he was born at a certain place beyond the seas, that is to
“ say, in India aforesaid, and was the son of parents neither
“ of whom was a natural-born subject of our Lady the Queen,
“ or any of her predecessors, sovereigns of this realm, or domi-
“ ciled in England, both of whom at the time of his said birth,
“ and from thence hitherto, were domiciled in India aforesaid.
“ That the petitioner has never abandoned his said domicil of
“ origin or acquired any domicil elsewhere; but, on the con-
“ trary, he became and was an officer of the military forces of
“ the East India Company, bound and liable to serve as such
“ officer within certain territorial limits beyond the seas, that
“ is to say, in India aforesaid, and that he so continued to be
“ such officer up to and until the passing of a certain Act of
“ Parliament, made and passed in the Session of Parliament,
“ held in the twenty-first and twenty-second years of the reign of
“ the now Queen, entitled ‘ An Act for the better Government
“ of India,’ and that he then and from thence hitherto con-
“ tinued to be and still is an officer of the said forces, that is
“ to say, a local Major in the 14th Regiment of the Native
“ Infantry of Her Majesty’s Indian Army, otherwise the
“ Schewattie Brigade, otherwise the Schewattie Battalion,
“ now stationed at Goruckpore, in India aforesaid, and that
“ at the commencement of this suit he was and now is absent
“ from the said regiment on furlough. That the said mar-
“ riage was celebrated in India aforesaid, according to the
“ laws and customs thereof, and not within this jurisdiction.
“ That the respondent’s domicil of origin is in India aforesaid,

“ where she was born, and was the daughter of parents neither
 “ of whom was a natural-born subject of our Lady the Queen, May 20 and
 “ or of any of her predecessors, sovereigns of this realm, or June 3.
 “ domiciled in England, and both of whom were at the time FORSTER
 “ of her said birth, and from thence hitherto, domiciled in v.
 “ India aforesaid, and that she hath never abandoned her FORSTER AND
 “ said domicile of origin, nor hath she ever been, nor is she BERRIDGE.
 “ domiciled in England, or within the jurisdiction aforesaid,
 “ and that her said husband had never cohabited with her in
 “ England, or within the jurisdiction aforesaid; wherefore
 “ the respondent humbly prays judgment whether there is
 “ anything in the said petition which she ought to be com-
 “ pelled to answer; and whether this Court hath any juris-
 “ diction in the matter of this suit, or can, or will, or ought
 “ to take any further cognizance thereof.
 (Signed) “ MARY OWEN FORSTER.”

Mr. H. F. Gibbons moved the Court to order that the plea May 13.
 should be struck out.

Mr. W. G. Harrison, contra, cited ‘The *Ida*,’ 1 Lushington’s
Admiralty Rep. 6. *Cur. adv. vult.*

THE JUDGE ORDINARY: In this case a petition was filed May 20.
 by a husband for dissolution of marriage. The respondent ap-
 peared absolutely by attorney, and not in person, or under
 protest. There are cases in the Common Law Courts in which
 objections may be taken to the jurisdiction under the general
 issue or by a special plea. I say nothing as to the possibility
 of the respondent’s raising the question of jurisdiction, but
 she certainly cannot by the practice of this Court do so by a
 plea in this form. If I were to admit the plea, and ultimately
 should hold that it was not proved, the result of a trial, which
 might be long and expensive, would be that the respondent
 would have to do what I think she is now bound to do, viz.

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file an answer. The case cited from the Admiralty Reports is not in favour of the respondent. In 'The Ida' there was an absolute appearance; the plaintiff proceeded by act on petition, and in it set out facts which raised a question of jurisdiction. The learned Judge of the Admiralty Court, treating that as equivalent to a voluntary declaration, allowed objection to be taken to the jurisdiction. That decision has no bearing on the present question. Here a dilatory plea has been pleaded in person by the respondent, who is not before the Court in person, but by attorney. Such a proceeding is quite irregular in all respects, and the plea must therefore be struck out.

Plea struck out.

On the 26th of May the respondent filed an act on petition, which was as follows :—

“ William Francis Low, solicitor for Mary Owen Forster, says that on the 20th day of June, 1839, she was married to William Robert Forster, at Bareilly, in India, and that before and at the time of the said marriage the said William Robert Forster was, and from thence hitherto hath been, and still is, domiciled in India aforesaid, and not in the realm of England or within the jurisdiction of this Court. That his domicil of origin was Indian. That he was born in India aforesaid, and was the son of parents neither of whom was a natural-born subject of our Lady the Queen, or of any of her predecessors, sovereigns of this realm, or domiciled in England, and both of whom at the time of his said birth, and from thence hitherto, were domiciled in India aforesaid. That the father of the said William Robert Forster was born in India, and afterwards entered the military service of the East India Company, and the mother of the father of the said William Robert Forster was a Mohammedan lady.

“ Secondly, That the said William Robert Forster has never abandoned his said domicil of origin or acquired any domicil elsewhere, but, on the contrary, he became and was an officer

“ of the military forces of the East India Company, bound and
 “ liable to serve as such officer within certain territorial limits
 “ beyond the seas, that is to say, in India aforesaid, and that
 “ he so continued to be such officer up to and until the pass-
 “ ing of the Act of Parliament 21 & 22 Vict. c. 106, entitled
 “ ‘ An Act for the better Government of India,’ and that he
 “ then and from thence hitherto hath continued to be and
 “ still is an officer of the said forces, that is to say, a local
 “ Major in the Fourteenth Regiment of the native infantry of
 “ Her Majesty’s Indian Army, otherwise the Schewattie Bri-
 “ gade, otherwise the Schewattie Battalion, now stationed at
 “ Goruckpore, in India aforesaid, and that on the 21st day of
 “ March, in the year of our Lord 1862, he was, and from
 “ thence hitherto hath been and now is absent from his said
 “ regiment on furlough.

“ Thirdly, That the domicil of origin of the said Mary Owen
 “ Forster is in India aforesaid, where she was born and bred,
 “ being the daughter of parents neither of whom was a natural-
 “ born subject of our Lady the Queen, or of any of her prede-
 “ cessors, sovereigns of this realm, or domiciled in England,
 “ and both of whom were at the time of her said birth, and
 “ from thence unto their respective deaths, domiciled in India.
 “ That the said Mary Owen Forster has never abandoned her
 “ domicil of origin, nor has she ever been, nor is she, domi-
 “ ciled in England, or within the jurisdiction of this Court.

“ Fourthly, That on the 21st day of March, in the year of
 “ our Lord 1862, a citation was issued out of this Court at the
 “ suit of the said William Robert Forster, and a petition filed
 “ by him praying for a dissolution of his marriage with the said
 “ Mary Owen Forster by reason of adultery, which said cita-
 “ tion and a copy of the said petition was served upon the said
 “ Mary Owen Forster on or about the 24th of March, in the
 “ year of our Lord 1862.

“ Wherefore the said William Francis Low prays that it
 “ may be declared by this honourable Court that at the time

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1862. " of the issuing and service of the said citation and petition,
 May 20 and " both the said William Robert Forster and the said Mary
 June 3. " Owen Forster were domiciled in India, and that the Courts
 FORSTER " in India were the competent and exclusive authority to deal
 v. " with the matters of the said petition and to determine the
 FORSTER AND " conjugal rights of the said Mary Owen Forster, and the re-
 BERRIDGE. " spective claims of herself and of her said husband, and that
 " this honourable Court has no jurisdiction in respect of the
 " matter aforesaid. And that this honourable Court may
 " make such further and other order in the matter as it might
 " seem fit.

(Signed) " WILLIAM FRANCIS LOW."

May 27. *Mr. H. F. Gibbons* moved for directions as to mode of trial.

Dr. Phillimore, Q.C. (*Mr. W. G. Harrison* with him):
 The respondent has filed an act on petition for the purpose of
 raising the question of jurisdiction.

THE JUDGE ORDINARY: In the Ecclesiastical Court, did not
 a party by appearing absolutely waive any objection to the
 jurisdiction in the first instance?

Dr. Phillimore: Yes. Can the respondent raise the ques-
 tion at the hearing?

THE JUDGE ORDINARY: As at present advised, I think she
 may; but she has not filed an answer.

Dr. Phillimore then asked leave to file an answer.

THE JUDGE ORDINARY granted the application.

June 3. *Mr. H. F. Gibbons* moved that the act on petition should be
 struck out.

Dr. Phillimore, Q.C., and Mr. W. G. Harrison, for the respondent.

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THE JUDGE ORDINARY: Let it be struck out.

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Mr. H. F. Gibbons: I also ask that the costs of these motions may not be taxed against the husband.

THE JUDGE ORDINARY: Certainly. The costs of such interlocutory motions, if the wife is unsuccessful, are not taxed against the husband.

The respondent afterwards filed an answer, and the case was set down for trial.

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Intervention.—Material Facts put on the Record, but not proved at Trial.—23 & 24 Vict. c. 144, s. 7.

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Where an appearance had been entered by a friend of the co-respondent, against whom £5000 damages had been awarded, for the purpose of showing cause against a decree *nisi* being made absolute, on the ground that there were material facts in the case which were not brought to the notice of the Court, and most of the material facts had been put on record by the parties, and were not established at the trial, and the intervener had not established by affidavit a single fact of importance, the Court declined to suspend its decree, and condemned the intervener in the costs occasioned by the intervention.

This case was heard before the Judge Ordinary and a special Jury on the 19th and 20th of December, 1862. The petitioner, Major Forster, an officer in the Indian Army, instituted a suit for the dissolution of his marriage with the re-

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spondent and for damages, on the ground of her adultery with the co-respondent (see *ante*, p. 144). The respondent and co-respondent having appeared absolutely in the suit, applied on summons to be allowed to appear under protest to the jurisdiction of the Court; but their application having been rejected (see *ante*, p. 145), they subsequently filed answers, in which they respectively denied the adultery, and brought counter-charges of adultery, and misconduct conducing to adultery, against the petitioner. The respondent and co-respondent appeared by counsel at the trial, when the adultery was proved, and after some evidence had been given on behalf of the respondent on some of the counter-charges, her counsel (*The Queen's Advocate*) abandoned his opposition to the petitioner's suit. The counsel for the co-respondent (*Mr. Montague Smith, Q.C.*) then having addressed the jury in mitigation of damages, which were assessed at £5000, a decree *nisi* for the dissolution of the marriage was thereupon pronounced, and since the decree *nisi* Mr. William Graham had entered an appearance as an intervener, under sec. 7 of 23 & 24 Vict. c. 144, for the purpose of showing cause against the decree *nisi* being made absolute. He had within the time allowed filed an affidavit, deposing that he had received information which he believed to be true:—(1.) That the petitioner and respondent were both born in the East Indies of Indian parents, who were always domiciled in India; that they were married in India, and that from the time of their respective births up to the date of the decree *nisi*, they had been always domiciled in India. (2.) That the petitioner had, during the years 1854 and 1855, committed adultery with a native woman in India, whom he had kept as his concubine. (3.) That he had without any reasonable grounds refused to cohabit with his wife for some years prior to the adultery, and had also been guilty of neglect and misconduct towards her conducing to the adultery. (4.) That if the Court would allow time for further inquiries, he would procure evidence to establish the domicil, adultery, and

misconduct of the petitioner towards his wife. The intervener also filed affidavits made by Mr. Melton, the co-respondent's solicitor, and others, showing that two discharged servants of the co-respondent, who had given evidence against him at the trial, which had prejudiced his case, had sworn falsely in answer to questions put to them on cross-examination, denying that they had committed or been taken in custody for feloniously stealing some of the co-respondent's property.

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Mr. Barron, the petitioner's solicitor, in answer to these affidavits, filed an affidavit, not denying the domicile of the petitioner and respondent, but alleging that the questions raised by the intervener's affidavit were or might have been investigated at the trial, and that he had reason to believe that the intervener was a personal friend of the co-respondent's, and had intervened at his instance.

THE JUDGE ORDINARY, on the motion of the petitioner's counsel, directed the questions raised by these affidavits to be argued before the Court on the first day of Trinity Term, 1863.

The case came on for argument, when

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Mr. Mundell and *Mr. Gibbons* appeared for the petitioner; and *Mr. Coleridge, Q.C.*, and *Dr. Tristram*, for the intervener.

Mr. Coleridge, in showing cause against the rule, said he thought it right to inform the Court that the Queen's Proctor had been asked to intervene and had declined, and that Mr. Graham, the intervener, was a personal friend of the co-respondent, Mr. Berridge.

THE JUDGE ORDINARY: Does he intervene at the instance of Mr. Berridge?

Mr. Coleridge: No.

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THE JUDGE ORDINARY: Does he swear that? I am rather curious to know how the fact is, although it is immaterial.

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Mr. Coleridge said there was no statement on the subject in the affidavits, but no doubt Mr. Berridge was willing that Mr. Graham should intervene, and was anxious that he should succeed. But the fact that Mr. Graham's motive for intervening was his personal friendship for Mr. Berridge could not affect the decision of the Court upon the question whether there were good grounds for his intervention. Some motive must be acting upon the mind of every person not the public officer, who intervened under this statute, and Mr. Graham's motive was not a discreditable one.

THE JUDGE ORDINARY: It was the intention of the Legislature to allow an independent third person to intervene for the purpose of giving information to the Court which the parties themselves had wilfully withheld.

Mr. Coleridge said that any person interested in the public morals and the well-being of society would be justified in intervening. The first ground of the intervention was, that the Court had no jurisdiction over the parties to the suit.

THE JUDGE ORDINARY said he had already held that a co-respondent and a respondent had no right to raise that question after they had appeared absolutely. It was not likely that he would act upon an objection raised by a third person which the parties had not been allowed to plead.

Mr. Coleridge submitted that the question of jurisdiction could be raised at any stage of the suit. The petitioner in this case had never been domiciled in England; he always had been, and he now continued, domiciled in India. He was married in India to a lady who also had an Indian domi-

cile, the cohabitation was in India, and the children were born there.

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THE JUDGE ORDINARY: I should have been very glad indeed if the Legislature had said that the Court had no jurisdiction except over persons domiciled in England. When Lord Campbell was Lord Chancellor, I asked him to bring in a Bill to settle the question and to define my jurisdiction; but he said, "I cannot do it. Whenever that question is raised, it must be decided upon legal principles. It cannot be defined."

Mr. Coleridge referred to the cases which have been decided in this Court upon the question of jurisdiction, for the purpose of showing that the Court had no jurisdiction, and ought, therefore, to rescind its decree, and dismiss the petition (*Ratcliff v. Ratcliff and Anderson*, 1 Swab. and Tris. 467; *Yelverton v. Yelverton*, 1 Swab. and Tris. 574; *Deck v. Deck*, 2 Swab. and Tris. 90; *Bond v. Bond*, 2 Swab. and Tris. 93; *Brodie v. Brodie*, 2 Swab. and Tris. 93). There were two other grounds for the intervention of Mr. Graham,—first, that he had good ground for believing that Major Forster had been guilty of repeated acts of adultery in India; and, secondly, that Major Forster had, in a great measure, contributed to his own dishonour by his wilful neglect and misconduct. Mr. Graham deposed that he had reason to believe that since 1847 Major Forster had treated his wife with indignity, insult, and neglect; that he had also reason to believe that during 1854, 1855, and 1856, Major Forster had lived with a woman in India as his concubine; and that he had every reason to believe that, if the Court would suspend making its decree absolute, he should be able to procure evidence that Major Forster had been guilty of habitual adultery. Other affidavits had been filed by Mr. Graham with regard to some evidence which had been produced at the trial bearing rather hardly upon Mr. Berridge.

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THE JUDGE ORDINARY: It is hardly within the province of an intervener to move for a new trial upon affidavits. I have endured a good deal of Mr. Graham's proceedings, but that is really too bad.

Dr. Tristram followed on the same side. The Act did not direct the Court to inquire into, or to be influenced by, the motives of an intervener in making the intervention. It simply stated (sec. 7) "that any party might intervene and show "cause why the decree should not be made absolute by reason "of material facts not brought before the Court." If Mr. Graham established facts showing that the petitioner and respondent were never subject to the jurisdiction of the Court; or that the petitioner had committed adultery in India; or that he had been guilty of misconduct conducing to the adultery of the respondent, these would be clearly material facts which ought to be brought to the notice and consideration of the Court. Mr. Graham swore that he had reason to believe that if the Court ordered further inquiry, he would be able to establish these facts. He submitted therefore that there were good grounds for the Court to order such an inquiry to be made within a reasonable time and at Mr. Graham's risk as to costs.

Mr. Mundell supported the decree. He pointed out that Mr. Graham did not depose to any material fact, but merely to his belief in certain facts, and he did not even state from whom he had received his information. He also submitted that it was not competent to an intervener to raise the question of jurisdiction, as that was not a fact material to the issue.

THE JUDGE ORDINARY said it was unnecessary to carry the argument any further. Soon after the Court was established it was suspected that attempts had been made to procure a

dissolution of marriage by means of collusion, and there had been other instances in which both the party suing and the party sued were equally anxious to obtain a divorce, and without collusion the party sued abstained from setting up matter which might be set up in answer to the petition. It was in order to check these practices that the statute was passed, and not at all for the purpose of enabling persons to raise questions as to the jurisdiction of the Court. The question of jurisdiction might, for aught he knew, be raised elsewhere, and he should be very glad if any authority would point out to him that he had not jurisdiction in the case. With regard to the point that material facts had not been brought before the Court, it would be affectation to pretend that he was not satisfied that this was really an application made by Mr. Berridge in the name of a third person. Mr. Graham took a strange interest in the proceedings of this Court. It was very kind of him, a wine merchant at Stockton, to give himself so much trouble in the matter. But what a state the Court would be in, if any man in the empire could come before it and ask it to rescind its decision in a suit because it had made some mistake! It was, however, in truth, an application by Mr. Berridge for a re-trial, or, at any rate, for a postponement of the execution for the damages until the petitioner returned from India, and could be put into the box and cross-examined. The ground of it was that material facts had not been brought before the Court. But the material facts had been put on the record by the parties, they had made charges against the petitioner in the pleadings, and he had put himself on his trial with reference to those charges. Some evidence was given in support of one of those charges, but the learned counsel for the respondent felt bound to abandon them, and he had most properly abandoned them. Mr. Graham having lent himself to these proceedings, and not having condescended to tell from whom he received his information, and not having substantiated a single fact of importance, he must pay the costs occa-

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May 22. its decree.

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[An application was subsequently made by Mr. Berridge, the co-respondent, to the Queen's Bench for a prohibition against the Judge Ordinary making the decree *nisi* absolute, on the ground of want of jurisdiction. The Court of Queen's Bench granted a rule *nisi*, and on a motion being made by Mr. Mundell for the decree *nisi* to be made absolute, the Judge Ordinary said he had been served with a copy of the rule *nisi* obtained in the Queen's Bench, and that he must decline making the decree absolute until the Queen's Bench had decided the question of jurisdiction. Cause was subsequently shown against the rule *nisi* obtained in the Queen's Bench by Mr. Lush, Q.C., and Mr. Gibbons, for Major Forster; Dr. Deane, Q.C., appeared for the Judge Ordinary, and Mr. Coleridge, Q.C., Mr. Mellish, Q.C., Dr. Tristram, and Mr. Willoughby, in support of the rule, when the Court discharged the rule *nisi* with costs, on the ground that Mr. Berridge had not such an interest in the suit as to entitle him as a matter of right to a prohibition, and had not made out such a case as would justify the Court in the exercise of its discretion to grant one.]

June 16 & 23.

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*Decree Absolute.—Directions as to the Disposition of
Damages.*

The Court directed the £5000 damages awarded in this case to be paid to the petitioner's solicitor; £1000 to be paid by him to the petitioner; out of the residue an annuity of £120 to be purchased for the respondent's life, to be paid to her "*dum casta virerit*," with

remainder to two of her daughters ; and the remainder to be invested in an annuity for these two daughters.

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The Court, on the motion of *Mr. Mundell*, now made the decree *nisi* absolute.

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Mr. Mundell then moved for directions as to the application of the £5000 damages assessed against the co-respondent. He proposed that £1000 should be paid to the petitioner, to be applied by him in defraying the extra costs incurred by himself in the case, and in paying certain costs incurred by the husband of a lady with whom the petitioner had been charged on the record with adultery, who, to protect his wife's honour, had instructed counsel to watch the case on her behalf.

THE JUDGE ORDINARY : The husband of the lady referred to was at liberty, if he chose, to instruct counsel to watch the case, but I have no authority to make an order for the payment of his costs.

Mr. Mundell proposed that the remainder of the £5000 should be invested for the benefit of the respondent and two of her daughters, who persisted in living with her against the wish of Major Forster.

Cur. adv. vult.

THE JUDGE ORDINARY : This was an application to the Court to make an order directing how the £5000, assessed by the jury as the damages to be paid by the co-respondent, should be disposed of. The authority I am called upon to exercise in this matter is given by the 23rd section of the Divorce Act. I think that the money should be paid to the petitioner's solicitor, to be applied by him as follows :—£1000 to be paid over to the petitioner, as he has been put to extra costs which he cannot recover against the co-respondent ; out

June 23.

1863. of the residue of the damages I direct an annuity of £120 to
June 16 & 28. be purchased for the life of the respondent, to be paid to her
“*dum casta vixerit*,” and in the event of her forfeiting it by
FORSTER the breach of this condition, to be paid over to the two
v. daughters, who are living with her; the rest of the residue
FORSTER AND I direct to be invested in the purchase of annuities payable to
BERRIDGE. these two daughters during their lives. The money to be invested in the name of a trustee; and there should be a clause in the deed against anticipation.

The order made by the Court was in the following terms:—

“The Judge Ordinary having taken time to deliberate,
“directed that the sum of £5000, being the damages assessed
“in this cause, be paid to the petitioner’s solicitor, to be by
“him applied in the following manner:—that £1000 be paid
“to the petitioner for his own use; that an annuity for £120
“a year be bought in the names of two trustees on the life
“of the respondent, and that such annuity be paid by the
“trustees to the respondent so long as she shall lead a moral
“and respectable life; but should the respondent not lead a
“respectable and moral life, then that her interest in the
“annuity should be forfeited, and that the trustees should pay
“such annuity to the two daughters of the marriage, in equal
“portions, or to the survivor of them; and that the residue
“of the said sum should be invested in the purchase of equal
“annuities for the use of the two daughters of the marriage
“on their own lives; and that a deed should be prepared and
“settled by one of the conveyancing counsel of the Court of
“Chancery, whereby this order should be effectually carried
“out through the intervention of trustees, and anticipation
“of the annuities should be prevented.”

(*Before the Full Court,—THE JUDGE ORDINARY, MARTIN, B., and
WILLES, J.*)

MATTHEWS v. MATTHEWS.

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v.
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*Suit for Judicial Separation.—Cruelty.—Deed of Separation.—
Lapse of time.*

In a suit for judicial separation, brought by the wife, on the ground of cruelty :

Held, on appeal, affirming the decision of the Judge Ordinary, that lapse of time, though not an absolute bar, yet taken in connection with other circumstances, *e. g.* a deed of separation, may show that the application was not made, *bond fide*, for the protection of the wife, but for some collateral purpose ; and that if the Court was satisfied of this, the petition ought to be dismissed.

This was an appeal from a decision of the Judge Ordinary, dismissing a petition filed by the wife for judicial separation on the ground of cruelty. The marriage took place in 1844. In 1848 the husband bought a house and shop at Chipping Norton, where he carried on the business of a grocer, and the trustees of his marriage settlement advanced on it £1000 of the wife's property. The husband took to drinking, and according to the petitioner's evidence, between 1848 and 1853 he frequently struck her. In July, 1853, he sold the business to the petitioner's brother, and in October, 1853, they separated, when a deed of separation was executed, by which he gave up his interest under marriage settlement, covenanted to allow her to live apart, as if she were a *feme sole*, and gave her the custody of the children. The respondent denied that he had ever struck the petitioner ; but her evidence was corroborated by three witnesses.¹

THE JUDGE ORDINARY by his decree dismissed the petition, and from this decree the petitioner appealed.

¹ See also 1 Swab. & Trist. 500.

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THE JUDGE ORDINARY reported the evidence as laid before him at the hearing, and said that his judgment was as reported in 1 Swab. & Trist. p. 500.

Dr. Phillimore, Q.C. (Mr. Prentice with him), appeared for the appellant, and cited Ferrers v. Ferrers, 1 Cons. 130; D'Aguilar v. D'Aguilar, Ibid. 134 n.; and Mordaunt v. Mordaunt, Ibid. 135 n.

Dr. Spinks (Mr. Field with him), for the respondent, cited Mortimer v. Mortimer, 2 Cons. Rep.; Coode v. Coode, 1 Carl. 755; Bettington v. Bettington, 1 Eccl. & Adm. 260; Sanders v. Rodway, 16 Beav. 207.

MARTIN, B.: The decision of the Judge Ordinary must be affirmed. I am not satisfied upon the then existing evidence of facts, that an Ecclesiastical Court would, in 1853, have granted a decree. In the first place, what are the facts? The circumstances we are investigating occurred eight years ago. I should be sorry to say that the petitioner came here to give evidence, which she believed at the time not to be strictly consistent with truth; she is speaking, however, of what occurred at a time very distant, and the law says that you cannot place implicit reliance on such statements. There is often misunderstanding and exaggeration in detailing what happened a long time ago, and experience has taught us the danger of relying upon such evidence as the ground for judicial decisions. I agree with Dr. Phillimore that lapse of time is no bar; that is, it would be a bad plea to say that admitting the facts to be true, they occurred so many years ago. The petitioner is corroborated as to some of the facts by servants in the house, who would be inclined to take a strong view of what was done to their mistress. No doubt, they state with perfect sincerity what they believe to be true; but the petitioner never complained of her husband's conduct to

the medical man, who lived next door. I do not say that she is saying what is untrue, but I think that having talked the matter over with her friends, she has arrived at her present opinion, which varies from what really took place. A young man, who lived near them, never heard anything about it; and the very fact of the husband being a drunkard would have made his actions all the more notorious. I therefore doubt the existence of such acts of cruelty as would have justified a judge in 1852 in granting a divorce *à mensd et thoro*. You must also take into consideration the deed of separation; I do not say that it is an estoppel; I cannot, however, shut my eyes to the fact that the husband has never interfered with her since the execution of the deed, and has acted upon it as binding upon him; and she never moved in the matter until an Act of Parliament is passed, which places her in a very different position with regard to property. I cannot but think that these proceedings have been taken not for the real *bond fide* purpose of protecting herself against the cruelty of her husband, but to put her in a position with regard to certain property different from that which she occupies under the deed of separation; and I believe, that if I had been sitting alone, I should have arrived at the same conclusion as the Judge Ordinary did.

1860.

June.

MATTHEWS

v.

MATTHEWS.

WILLES, J.: I am of the same opinion. Assuming that the witnesses on both sides are worthy of belief, the balance of probability is against the petitioner. Assuming that her case of cruelty was made out, I think that the sentence of the Judge Ordinary was correct, for the reasons given by him. I cannot but think that this suit was not instituted for the protection of the petitioner, but for a less legitimate object. This is a case which we ought not to encourage; we ought to carry out the law as far as we can, and the object of the law is to protect women from cruelty, and not to enable them to effect by by-ways that which is not the real object in a cause.

1863.

June.

MATTHEWS

v.

MATTHEWS.

The delay, taken into consideration with the deed, shows that there was no such apprehension of danger as is now alleged. A suit for this purpose must be sincere, I mean sincere in a legal sense. The case of *Bettington v. Bettington* is very strong on this point, if, indeed, it is necessary to cite authorities. Dr. Lushington, in his judgment in that case, said:—“As relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved, and sensible of their grievance, and then only *vigilantibus, non dormientibus*. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it.” I think this last expression is applicable to the present case. The lapse of a considerable time ought to induce the Court to use vigilance to see that the suit has been instituted for the real purpose. If the lapse of time occurs under such circumstances as to satisfy the Court of the insincerity of the suit, it ought to pronounce against the application. Adopting the language of the Judge Ordinary, I do not mean to put the lapse of time as an absolute bar, but I think that taken in connection with the deed of separation, it shows that this is not a *bond fide* application made for the protection of the wife, but for some collateral purpose, and that the Court ought not to grant the prayer of the petitioner.

Decree affirmed.

CASES

IN THE

COURT OF PROBATE.

In the Goods of WILLIAM HUTCHESON (deceased).

Confirmation and Probate Act (1858).—Eik.—Seal of Court.

—New Confirmations.—Practice.

1863.

April 21.

The seal of the Court will not be affixed to an eik or additional confirmation.

Where the original confirmation obtained in a Commissary Court of Scotland is incomplete, it is requisite, for the purpose of obtaining the seal of the Court of Probate, that there should be a new confirmation, including the whole of the personal estate in England and Scotland.

In the Goods of
WILLIAM
HUTCHESON.

William Hutcheson, a domiciled Scotchman, executed in Scotland a disposition and settlement, or will, of his whole estate, and died on the 13th of March, 1862.

On the 13th of January, 1863, the executor nominated in the will obtained a confirmation in the Commissary Court of Fife. The inventory stated the whole personal estate as amounting to £1444, and did not state that any part of it was in England. On its being subsequently ascertained that part of the funds which made up this total were invested in shares (valued at £100) in an English company, an “explanatory note” to the inventory was lodged, in which the amount

1863.

April 21.

In the Goods of
WILLIAM
HUTCHESON.

in Scotland and in England was correctly distinguished, as directed by the 21 & 22 Vict. c. 56, s. 9. On the 28th of January, the Commissary Court of Fife "allowed the foregoing explanatory note to be added to the inventory of the defunct's personal estate, and to be added and eiked to his testament as part and portion thereof, and ordained these presents to be granted in manner under written;" and then proceeded to grant confirmation of the executrix in common form, without further reference to the prior confirmation. On the same date the Commissary, by his Interlocutor, found that the deceased died domiciled in Scotland. On the two confirmations being presented to the Registrar of the Court of Probate for resealing, under sect. 12 of the statute above cited, he declined to affix the seal of the Court, on the ground that he had no power to seal more than one confirmation.

March 12.

Mr. Boyd Kinnear, for the executrix, moved the Court for an order on the Registrar to affix the seal of the Court to the confirmation. The case *In the Goods of Gordon*, 2 Swab. & Trist. 622, does not apply to this, as there the confirmation was prior to the passing of the statute; and both in that case and in the case of *In the Goods of Wingate*, 2 Swab. & Trist. 625, the eik or new confirmation was in the nature of an addition, and contained only the part of the estate situated in England which had been wholly omitted from the original inventory, and hence did not, as required by the statute, include both the estate in Scotland and that in England. Here the original inventory contained both the Scottish and English estates, and the second inventory contained in the "explanatory note" was in conformity with the statute. The new confirmation obtained upon it merely recited the first confirmation, and was otherwise independent and complete.

Curr. adv. vult.

SIR C. CRESSWELL : I have considered this case, and I think

I ought not to direct the seal of the Court to be affixed to the eik or additional confirmation. If the Commissary Court in Scotland had granted a new confirmation, including the property in England, instead of an eik, the seal might have been affixed. The Scotch Court does not choose to grant a new confirmation including this property, and I do not choose to seal this grant until this has been done.

1863.
April 21.

In the Goods of
WILLIAM
HUTCHESON.

In the Goods of JOHN ALLNUTT (deceased).

March 17 and
May 5.

Codicil.—Erroneous Reference to a Previous Codicil.

In the Goods of
JOHN
ALLNUTT.

The testator duly executed a will and five codicils. The first executed codicil, dated the 25th of March, 1848, commenced, "This is the "second codicil to the will of A.," and ended, "In all other respects "I confirm my said will, save only so far as the same is unrevoked "by my first codicil thereto, and I do hereby confirm the said codicil." It did not appear that the testator had executed any codicil to his will prior to this one, described as the second codicil to his will; but his solicitor, after the date of the will, and before the date of this codicil, forwarded to him for his perusal a draft codicil, which, when he prepared this codicil, he erroneously concluded had been executed, and therefore described it as a second codicil. The draft codicil was, after the testator's death, found tied up in a parcel containing the will and five executed codicils.

Held, that the draft codicil was not sufficiently identified as the paper intended to be referred to by the deceased in his first executed codicil, and could not be admitted to probate.

John Allnutt, late of Clapham, Surrey, died on the 12th of January, 1863, having duly executed a will and five codicils, and thereof appointing his wife Eleanora, his son John Allnutt, his son-in-law Henry Carr, and Robert Baxter, trustees and executors. His will was dated the 19th of May, 1841; the first codicil the 25th of March, 1848; the second, the 21st of January, 1854; the third and fourth, the 18th of

1863. April, 1854; and the fifth, the 17th of May, 1859. The
March 17 and first codicil commenced as follows:—"This is the second
May 5. "codicil to the will of John Allnutt the elder, of Clapham
In the Goods of "Common, in the county of Surrey, Esquire. Whereas by
JOHN "my said will, after making provision for the payment and
ALLNUTT. "satisfaction of divers pecuniary and specific legacies, I gave,
"devised, and bequeathed unto my trustees and executors
"therein named, all the residue and remainder of my real and
"personal estate, upon trust," etc. He then gave directions
as to certain tontines and policies of insurance, and con-
cluded:—"In all other respects I confirm my said will, save
"only so far as the same is unrevoked by my first codicil
"thereto; and I do hereby confirm the said codicil." Mr.
Woodgate, of Gray's Inn, solicitor, stated that he had acted
for Mr. Allnutt for thirty-five years, and had prepared for
him the will and five codicils; that in the month of March,
1848, by direction of the deceased, he prepared a draft of a
codicil, and sent the deceased the copy of it now before the
Court; that such codicil was never executed by the deceased,
but the substance of it was embodied in another codicil, which
was executed on the 21st of January, 1854; that in the month
of March, 1848, by direction of the deceased, he prepared the
codicil dated the 25th of March, 1848; that at the time this
last-mentioned codicil was prepared, it was supposed that the
draft codicil had been completed and executed by the deceased,
and, therefore, the codicil dated the 25th of March, 1848,
was therein stated to be a second codicil to the will, and that
such a reference was a mistake; that he had never prepared,
between the date of the will and the codicil of the 25th of
March, 1848, or at any other time, any other codicil or tes-
tamentary document, except the above-mentioned draft codicil
and the five codicils the deceased executed, and that he did
not know of any other person having been employed for such
purpose; that a few days before his death the deceased directed
the deponent to take out of a table-drawer in the drawing-

room a parcel ; that, in that parcel, the copy draft codicil was tied up with the will and five codicils. No papers were found of a testamentary character to which the words in the codicil dated the 25th of March, 1848, could refer, except the above-mentioned draft codicil.

1863.
March 17 and
May 5.
In the Goods of
JOHN
ALLNUTT.

Dr. Swabey moved for probate of the will and five codicils, together with the draft codicil, as having been confirmed by the first executed codicil. [He cited *The Countess Zichy Ferraris v. The Marquis of Hertford* (3 Curt. 468 ; on app. 4 Moo. P. C. 339 ; 3 N. C. 150) ; *Ingoldby v. Ingoldby* (4 N. C. 493) ; *In the Goods of S. F. Phelps, deceased* (6 N. C. 695) ; and *Allen v. Maddock* (11 Moo. P. C. 427).]

SIR C. CRESSWELL : I must assume that the deceased knew the contents of the papers he executed, and that he intended in the codicil of the 25th of March, 1848, to confirm some earlier document. The question is, then, whether the draft codicil is sufficiently identified as the paper he so intended to confirm. I am not satisfied that it is, and I decline to include it in the probate.

DAY v. THOMPSON.

June 23 & 30.

In the Goods of JAMES ALEXANDER FRAMPTON (deceased).

DAY
v.
THOMPSON.
In the Goods of
JAMES
ALEXANDER
FRAMPTON.

Administration de bonis non.—Assignee of Creditor.

F. died in 1836, leaving a will and one codicil, and therein appointed three executors and residuary legatees in trust. Two renounced, and the third took probate, but died in 1853, intestate. All the residuary legatees named in the will and codicil then renounced except T., and on his being cited and not appearing, a grant *de bonis non* (will annexed) was made to K., as a creditor. He died in 1858, leaving personalty of F. unadministered. F. was indebted to his

1863.

June 23 & 30.

DAY
v.THOMPSON.
In the Goods of
JAMES
ALEXANDER
FRAMPTON.

co-trustees of the marriage-settlement of D. in respect of certain trust-moneys misappropriated by him, which had been the subject of certain proceedings in Chancery. By indenture of 28th of December, 1860, the executors of the surviving trustee agreed with the persons beneficially entitled to the trust-fund to transfer all their right and title to sue, etc., on receiving discharges from such persons; and the Court, on T. being cited and not appearing, granted to the nominee of the assignees of the executors of the surviving trustee administration *de bonis non*, will annexed, of F., limited to revive and substantiate the proceedings in Chancery.

James Alexander Frampton, late of New Inn, and of Tavistock Square, St. Pancras, Middlesex, Esq., died on the 28th of September, 1836, having made his will with one codicil, and thereof appointed his brother William Hamwood Frampton, and two others (who renounced) executors and residuary legatees in trust. W. H. Frampton took probate, but died December 3rd, 1853, intestate. All the residuary legatees named in the will and codicil then renounced except William Thompson, who was at the time abroad, and on William Thompson being cited and not appearing, administration (with the will annexed) *de bonis non* was granted to Henry Knight as a creditor. Henry Knight died May 10th, 1858, leaving personalty unadministered. In July, 1862, a citation issued from the Court of Probate against William Thompson, at the instance of Frederick Frampton Day, stated to be a creditor, calling upon Thompson to take administration (with the will annexed) *de bonis non*, or show cause why it should not be granted to F. F. Day, as a creditor. An abstract of this citation was inserted in the papers under the direction of the registrar.

The deceased James Alexander Frampton was one of the trustees of three indentures of settlement of Mr. and Mrs. Day, dated the 3rd and 4th of November, 1816, and January 1st, 1817. The other trustees were James Alexander, who died in November, 1823; Matthew White, who died on March 11th, 1840; and John Benthall, the surviving trustee,

who died June 7th, 1852. John Benthall made a will, and appointed as executors Frances Benthall, John Benthall, and Francis Benthall, who took probate. 1863.
June 23 & 30.

On the death of James Alexander Frampton, in 1836, it was found that he had misappropriated the trust-funds under the above settlements to the amount of £7100. Thereupon a suit in Chancery was instituted to administer his estate, entitled *Alexander v. Foster and others*, and John Benthall, on behalf of the then surviving trustees, proved the said debt of £7100 against the estate of J. A. Frampton. On July 30th, 1856, the Master to whom the cause stood referred certified that a sum of £7259. 4s. 8d. was due to the executors of John Benthall, the surviving trustee of certain indentures dated the 3rd and 4th of November, 1816, and January 1st, 1817, for moneys had and received by the said testator James Alexander Frampton, as one of the trustees of the said last-mentioned indentures, and applied by him to his own use, being the sum of £7100, with interest and costs. By an order made at the hearing of the said cause of *Alexander v. Foster and others* for further directions, dated the 24th of June, 1857, it was declared that the sum of £7100 was a specialty debt of the said James Alexander Frampton, not binding his heirs. By an indenture dated the 28th of December, 1860, made between and executed by all the parties interested, it was stated to have been ultimately agreed that the executors of John Benthall, the surviving trustee, should receive the dividends remaining to be received on a sum of £466. 13s. Three per Cent. Annuities, and should sell and dispose of the principal sum, and should pay the produce of the sale and the above-mentioned dividends, together with a further sum of £600, part of the personal estate of John Benthall, to Sarah Day, Frederick Frampton Day, and Everett Bardwell jointly, on behalf of themselves and the other children of Sarah Day, and should execute such power of attorney for enabling the said Sarah Day (widow), F. F. Day, and Everett Bardwell to

DAY

THOMPSON.

In the Goods of
JAMES
ALEXANDER
FRAMPTON.

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DAY

THOMPSON.
In the Goods of
JAMES
ALEXANDER
FRAMPTON.

recover and receive the said principal sum of £7259. 4s. 8d., and to commence and carry out, at their own costs and charges, all such proceedings for enforcing payment thereof, or of any part thereof, as they should think proper, and that the said Sarah Day, F. F. Day, and Everett Bardwell should thereupon give a full discharge to the said executors in respect of the trust-funds under the indentures of settlement of Mrs. Day, and in respect of any breach of trust acquiesced in by John Benthall. It then proceeds to constitute Sarah Day, F. F. Day, and Everett Bardwell, attorneys for the said executors, for the purposes above-mentioned, and finally to release the said executors in respect of the trust property.

No proceedings could be taken to recover the debt against the estate of James Alexander Frampton in the Court of Chancery until a fresh representation was taken out to him.

The Court of Chancery having determined that the executors of the surviving trustee were creditors of the estate of the deceased on behalf of those beneficially interested in the trust-fund, Mrs. Day and her children, and as by the indenture of the 28th of December, 1860, Mrs. Day, F. F. Day, and Everett Bardwell were constituted representatives of the trust-fund in the place of the executors of the surviving trustee, the Court was asked to look upon Mrs. Day, F. F. Day, and E. Bardwell as creditors in equity, and grant administration to one of them as such.

Dr. Middleton moved the Court to grant administration to Everett Bardwell, as a creditor, instead of Frederick Frampton Day (*Maidman v. All Other, etc.*, 1 Phill. 51). The Master in Chancery had found that a debt was due from the estate of Mr. Frampton to the trust fund of Mrs. Day, and that fund was now represented by Sarah Day, Frederick Frampton Day, and Everett Bardwell.

SIR C. CRESSWELL: It appears to me that this case falls

under the rule laid down in *Baynes v. Harrison* (Deane, 15), and *Depit and Chapot v. Delerieleuse* (2 Swab. & Twist. 131). 1863.
June 23 & 30.

Dr. Middleton submitted that there was a material distinction. In those cases the debts had been sold absolutely after the death of the deceased; in this, the parties beneficially interested were the same at the time of death, at the date of the Master's report, and of the application,—the representatives of the trust fund only had been changed.

DAY
v.
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In the Goods of
JAMES
ALEXANDER
FRAMPTON.

SIR C. CRESSWELL: John Benthall, quâ trustee, was a creditor of the deceased's estate, and so were his executors. The new trustees under the original settlement, or the executors of the surviving trustee, may be entitled to administration as creditors, but not the mere attorneys of the latter.

Dr. Middleton then applied for a grant of administration to Everett Bardwell, as a nominee of Sarah Day, Frederick Frampton Day, and Everett Bardwell, limited to revive the suit and carry on the proceedings in Chancery.

SIR C. CRESSWELL: I will look into the papers with a view to this question. *Cur. adv. vult.*

SIR C. CRESSWELL: A grant limited to revive and substantiate proceedings in Chancery may be made in this case. June 30.

In the Goods of AMELIA FOZARD (deceased).

June 30.

Probate.—Cessat Grant.—Amount of Bond.—Probate Act,
1857, s. 82. In the Goods of
AMELIA
FOZARD.

F. appointed S. residuary legatee and executor, and in case of his decease leaving the directions of the will unperformed, substituted

1863.

June 30.

In the Goods of
AMELIA
FOZARD.

P. as executor. In August, 1850, probate was granted to S., who died in December, 1862, leaving certain legatees of income for their lives under the will surviving. P. renounced probate, and the widow of S. renounced administration with the will annexed. One of the legatees for life was entitled to administration with the will annexed, technically a cessat grant, on which bond is usually required in double the amount¹ of the deceased's property at time of death.

The Court, under 82nd section of Probate Act, 1857, directed a bond to be taken in the same amount as would have been required if the grant had been one *de bonis non*.

In this case Amelia Fozard, late of Penn, Buckinghamshire, spinster, deceased, died on the 10th of July, 1850, having duly executed her last will and testament dated the 11th of October, 1849, and appointed therein Thomas Staveley executor and residuary legatee, and in case of his decease during her lifetime, or after her decease leaving any of the directions contained in the said will unperformed, the testatrix appointed William Pulteney Scott to be such executor. Amongst other things, the testatrix, by her will, made the following bequest:—"I direct my executor to receive the "interest on my two shares in the Medway Canal Company, "and to pay the same unto Mrs. Mary Anne Jones during her "life, and after her death unto her daughter, Mrs. Elizabeth "Lloyd Phillips, during her life, and after the decease of the sur- "vivor of them, the said Mary Anne Jones and Elizabeth Lloyd "Phillips, to sell the said two shares and divide the proceeds "amongst all the daughters of Elizabeth Lloyd Phillips." On the 6th of August, 1850, probate was granted in the ordinary form to Thomas Staveley, and the property was sworn to be in value under £3000. Thomas Staveley died on the 8th of December, 1862, having made a will, and thereof appointed his wife Eliza Wowski Staveley sole executrix, who took probate of the same. On his death William Pulteney Scott, the substituted executor, renounced probate of the will of Amelia Fozard, and Mrs. Staveley, as representing the residuary

¹ See Coote's Common Form Practice, p. 136, 4th edit.

legatee, renounced administration with the will annexed. 1863.
 Mrs. Jones, as legatee for life of the two Medway Canal June 30.
 shares, applied for administration, with the will annexed, of the In the Goods of
 estate of the deceased Miss Fozard. The registrars considered AMELIA
 that the grant she applied for was a cessat grant, and that FOZARD.
 she must, according to the ordinary practice, give security to
 double the amount of the whole property, namely, £6000.

Dr. Spinks admitted that the grant applied for was a cessat grant, inasmuch as Mr. Staveley was only appointed executor for life, and could not transmit the office to his own executors; but he asked the Court to exercise its powers under 20 & 21 Vict. c. 77, s. 82, and allow security to be given to the amount of £600, being double the value of the two shares, the only property not distributed.

SIR C. CRESSWELL thought the safest arrangement would be to order the administratrix to give the same security as would have been required if the grant could have been taken as a grant of administration of the estate left unadministered by Thomas Staveley.

In the Goods of OUCHTERLONY (deceased).

June 30.

Probate.—Embodying Papers referred to by Will.

In the Goods of
 OUCHTERLONY.

A will made in November, 1861, contained a clause,—“I make no specific bequest to my brother’s children, etc. Upon this subject I refer my wife to my annulled will, dated the 11th of February, 1851.” The annulled will contained no bequest to those children; in it the testator stated that in the present aspect of affairs there was every prospect that they would be left well provided for; but that if any reverse should overtake them, he trusted and felt sure that his wife would share her all with them. Upon motion for probate of the will of November, 1861,
 HELD, that the annulled will did not raise any implied trust in favour

1863.

June 30.

of the said children, and that therefore it need not be embodied in the probate.

In the Goods of
OUCHTERLONY.

John Ouchterlony, a lieutenant-colonel in the Madras Engineers, died in the East Indies, on the 29th of April, 1863. After his death there were found in an envelope, in the possession of his widow, then residing in England, two testamentary papers: a will, dated the 11th of February, 1856, revoked by the deceased; and another unrevoked will, dated November 23rd, 1861.

By the will of 1861 the deceased devised and bequeathed all his property, real and personal, to or for the benefit of his wife and children, subject to some small pecuniary bequests, and to the payment of an annuity of £50 to his mother for her life, and after her decease to his sister, and appointed his wife, his brother James, and J. G. Johnston, his executors. The will contained the following clause:—"I make no specific bequest to my brother's children, because at the time of my writing this it is difficult to say whether or not my wife and children will inherit from me much more than a bare adequate support. Upon this subject I refer my dear wife to my annulled will, dated the 11th February, 1856, feeling sure should any of them ever want, she will share her last crust with them." The cancelled will contained this clause:—"Under the present aspect of affairs, there is every prospect that my brother James will attain affluence, and that his family will be left well provided for; but, should any of those reverses which fortune sends to the most favoured overtake them, I trust and feel sure my wife will share her all with them and his. The same remark applies to my brother Thomas and his family; and I make no specific provision for these contingencies, both on account of their remoteness and because I feel sure my wife's heart will dictate what it needs not my solemn injunction to ensure. In the same spirit I have made no stipulation regarding any members of our own family who may need her aid, and who, I well know, will

“not seek it in vain where their circumstances warrant her
 “rendering it without prejudice to the interest of her children,
 “which I solemnly but with perfect confidence entrust to her
 “keeping.”

1863.
 June 30.
 In the Goods of
 OUCHTERLONY.

Upon application in the registry for probate of the will of November 23, 1861, the question was raised whether the annulled will should not be incorporated in the probate, in consequence of the reference to it by the later will.

Dr. Spinks now moved the Court to direct that probate of the will of 1861 should be granted without incorporating in it the annulled will. [SIR C. CRESSWELL: Is there any authority showing that such a vague clause as that in the annulled will would, in the Court of Chancery, be considered to have raised a trust in favour of the deceased's brothers and their families?] Courts of equity frequently hold that an implied or constructive trust is created by mere recommendatory or precatory words of a testator, but I know of no case which would be an authority for holding that such a trust was created in the present case.

SIR C. CRESSWELL: In the absence of such an authority, it seems to me that in the present case no implied trust would be created. Probate of the will of 1861 may therefore be granted without embodying it in the annulled will.

Motion granted.

In the Goods of RIPPON (deceased).

July 14.

Probate.—Testator, British Subject, dying abroad after 24 & 25 Vict. c. 114.—Will executed in England in Accordance with the Law of England.—Domicil.

In the Goods of
 RIPPON.

When a British subject dies abroad after the passing of the 24 & 25

1863.

July 14.

In the Goods of
RIPON.

Vict. c. 114, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicile.

John Abraham Rippon, formerly of Dulwich, in the county of Surrey, late of the borough of D'Urban, Port Natal, in South Africa, died on the 28th of February, 1863, at D'Urban aforesaid.

On the 11th of October, 1861, the deceased at the same time duly executed two testamentary papers: the one (A.) conditional, *i. e.* to take effect only in case the vessel 'Marrieta,' in which he and his family were about to sail to Port Natal, should be wrecked, and himself and family lost; the other (B.) an absolute will, by which he gave all his property to his wife, and appointed her sole executrix. On the 12th of October, 1861, he and his family sailed for Port Natal, and arrived there in January, 1862.

Dr. Spinks now moved the Court to grant letters of administration, with the paper writing (B.) annexed, to R. O. Ripon, as the attorney of the deceased's widow, the sole executrix, for her use and benefit, until she should duly obtain probate of the said will. Paper B. is solely entitled to probate; paper A., although executed at the same time, being conditional, to take effect only upon an event which never happened.

SIR C. CRESSWELL: 24 & 25 Vict. c. 114, which was passed on the 6th of August, 1861, has rendered it unnecessary to consider whether or not the testator had changed his domicile.

(Before SIB CRESSWELL CRESSWELL.)

1863.

July 16.

MORTON v. THORPE AND OTHERS.

In the Goods of ASHTON MORTON (deceased).

MORTON

v.

THORPE AND
OTHERS.

In the Goods of
ASHTON
MORTON.

*Will.—Administration.—Parties interested under Will cited
and not Appearing.—Practice.*

Where parties interested under a testamentary paper have been cited to appear and propound it, and have not appeared and propounded it, the Court will grant administration as to an intestate, or probate of an earlier will, as the case may be, in common form :

Quære, ought not the will, in respect of which the parties are cited, to be filed in the registry, if in the possession or power of the party applying?

In this case the deceased, Ashton Morton, died on the 31st of January, 1863, a bachelor without a parent, and leaving John Morton and Martha Richardson, widow, his natural and lawful brother and sister, and his only next of kin and the only persons entitled in distribution in case he died intestate. After his death, a will bearing date the 22nd of November, 1862, was produced, wherein the said John Morton and John Thorpe were appointed executors ; and various persons of the names of Brown, Thorpe, and Richardson, including the said Martha Richardson, were legatees.

The will had been filed in the registry, and a citation, founded on the affidavit of John Morton, had been served on the other executor and the legatees, calling upon them to cause an appearance to be entered for them in the Court, and to propound the said will in solemn form of law, or to show cause why the said will should not be declared null and invalid, and why letters of administration should not be granted to John Morton, as the brother and next of kin of the deceased, with intimation that in case of the parties cited not appearing and propounding the will, the Court or its

1863. registrars would proceed in the premises, their absence notwithstanding.
July 18.

MORTON

v.

THOMPE AND
OTHERS.
In the Goods of
ASHTON
MORTON.

Mr. Pritchard moved the Court accordingly.

SIR C. CRESSWELL: Did not Sir Herbert Jenner, in *The Goods of Watts* (deceased), 1 Curt. 594, refuse to set aside a will on the consent of parties interested, observing that no person's consent can make a will no will? You had better consider this point.

Mr. Pritchard renewed the motion. In the case referred to it does not appear that the parties interested under the will had been cited to propound it. In a later case, where that was done, Sir Herbert Jenner approved the course adopted, and granted probate of a will of earlier date, passing over one of later date: *Palmer and Brown v. Dent and others*, 2 Rob. 284. Counsel also referred to certain unreported cases: *Bodicoate v. Gossip and others*, 15th Dec. 1849; *Hawker v. Hawke and others*, 19th March, 1850; *Westcott v. Langworthy*, 13th Nov. 1852, in support of the practice. There was also an affidavit of one of the attesting witnesses to the effect that he placed his signature to the will on the 1st of February, 1863, after the deceased was in fact dead.

SIR C. CRESSWELL: If you intend to rely on this affidavit, I should certainly require further information.

Mr. Pritchard: I rely on the cases cited, and submit that where the parties interested have been cited the Court need not have any information as to the validity or invalidity of the paper.
Cur. adv. vult.

June 30. SIR C. CRESSWELL: I have considered this matter, and think that there is a substantial distinction between citing

parties interested to appear and propound a will, and merely bringing in their consents to the will being passed over. As the parties cited in this case have not appeared, I think administration may go to the brother as prayed.

1863.
July 16.
MORTON
v.
THORPE AND
OTHERS.

In the Goods of WILLIAM COLES (deceased).

July 14.

Official Assignee of Creditor of Deceased.—Assignment of Debts to Purchaser.—24 & 25 Vict. c. 134, s. 137.—Assignment by such Purchaser.—Limited Grant to Assignee of Official Assignee.

In the Goods of
WILLIAM
COLES.
Amended
J.P.D. 427
Gallant
L.R. 3. 169

A., in 1813, assigned certain bills of exchange and negotiable instruments to B., who was, in 1833, adjudicated a bankrupt. In 1862, C. being his official assignee, assigned the sums remaining due and to become due on the said bills of exchange and the negotiable instruments to D. as purchaser, under the Bankruptcy Act, 1861, s. 137, and D. sold and assigned them to E.

The Court declined to make a grant of administration of the personal effects of A., limited to the aforesaid sums (the next of kin of A. having been cited and not appearing) to E; but made the grant to D., as assignee of the official assignee.

William Coles, late of Mincing Lane, in the City of London, merchant, died in February, 1835, intestate, leaving his widow (since deceased) and three children—Mr. William Coles, the Rev. George Coles, and Mrs. Hale—his only next of kin. No letters of administration of the personal estate and effects of the deceased had been taken out by any of his next of kin, or by any other person.

On the 20th of May, 1813, the following letter was handed by William Coles the intestate to Meir Macnin, of New Broad Street, in the City of London, merchant :—

“ Meir Macnin, Esq.

“ Sir,—You having this day accepted two bills of exchange,

1863. "the one for £4500 at twelve months' date, and the other

July 14. "for £900 at twenty-four months' date, both drawn by me

In the Goods of
WILLIAM
COLES.

"upon you, I do hereby undertake to pay to you all and every
"sum and sums of money which shall have been received by
"me for or in respect of certain bills of exchange and other
"negotiable instruments, this day assigned to me, under your
"directions, by the late firm of J. and A. Anderson and Co.,
"to enable you to provide for and take up your said accept-
"ances on the same respectively becoming due; and in the
"event of my not having received or paid over to you a sum
"of money equal in amount to your said acceptances on their
"respectively becoming due, I do further undertake to pay
"unto you at the respective times aforesaid, out of my own
"proper moneys, a moiety or half of the deficiency of such
"amount, whatever the same may happen to be. I do further
"also agree and undertake that on the said acceptances being
"taken up and paid in manner aforesaid, that I will deliver
"up and assign over to you such of the several bills of ex-
"change and other negotiable paper specified in the schedule
"of the said assignment by the late firm of John and Alex-
"ander Anderson and Co. to me, as shall be in their or my
"possession or custody, together with all benefit to be derived
"therefrom, on your releasing me from all claims and demands
"for or in respect of the same.

"I am, Sir, your most obedient servant,

"WILLIAM COLES."

By virtue of an indenture made the 20th of May, 1813, between Alexander Anderson, Alexander Wilson, and George Wilson of the first part, the said Meir Macnin of the second part, and the said William Coles (the intestate) of the third part, the said intestate became entitled to several bills of exchange, promissory notes, and other negotiable paper, referred to in the above letter as assigned to him, and all right, title, and claim whatsoever, both legal and equitable in respect thereof, and all powers and remedies for the recovery of all

and every the matters aforesaid, in trust nevertheless upon the happening of certain events (which have all since happened) for the said Meir Macnin. 1863. July 14.

The bills of exchange mentioned in the letter of the 23rd of January, 1818, were duly paid by the said Meir Macnin at maturity respectively.

In the Goods of
WILLIAM
COLES.

The said Meir Macnin was, in January, 1833, adjudicated bankrupt within the intent and meaning of the then law of bankruptcy, and Alexander Brymer Belcher (since deceased) and J. A. de Buck (also since deceased) were duly appointed the official and creditors' assignees, and Hatton Hamer Stansfield was subsequently duly appointed the official assignee, under the said bankruptcy, in the room of A. B. Belcher, deceased.

The said Hatton Hamer Stansfield, on the 13th of October, 1862, presented his petition to the Court of Bankruptcy, in London, whereby, after stating the bankruptcy of the said Meir Macnin, and his appointment as such assignee as aforesaid, and that there then remained some outstanding debts and other property due and belonging to the estate of the said bankrupt, which could not be collected and received without unreasonable expense and delay; and that the petitioner, as such assignee as aforesaid, had, subject to the approbation and direction of the said Court of Bankruptcy, contracted and agreed with Henry Grua to sell and assign to him such outstanding debts and other property at or for the price therein-mentioned, it was prayed that the said petitioner might be authorized to carry out the said contract, and to sell and to assign the said outstanding debts and other property, and also such of the books of the said bankrupt relating to his trade, dealing, and estate as were within the possession or power of the said petitioner accordingly.

On the 5th of October, 1862, the said petition came on to be heard before the said Court of Bankruptcy, and it was ordered that the petitioner, as such assignee as aforesaid, be

1863. authorized to carry into execution the said contract, and to
July 14. sell and assign the said outstanding debts and other property
of the said bankrupt accordingly.

In the Goods of
WILLIAM
COLES.

By an indenture, bearing date the 27th of October, 1862, and made in pursuance of the said agreement and under the authority of the said Court of Bankruptcy as aforesaid, the said Hatton Hamer Stansfield did sell, assign, and transfer unto the said Henry Grua, his executors, administrators, and assigns, all the outstanding debts and other property due and belonging to the estate of the said Meir Macnin, with full power and authority, but in the name of the said Henry Grua, to ask, demand, sue for, recover, receive, and give effectual receipts, releases, and discharges for the said outstanding debts and other property, and all right, title, interest, property, claim, and demand of him, the said Hatton Hamer Stansfield, into or upon the said outstanding debts and other property and premises thereby assigned or intended so to be unto the said Henry Grua, his executors, administrators, and assigns, to and for his and their own use and benefit absolutely.

By an indenture, bearing date the 20th of November last, and made between the said Henry Grua of the one part, and David Cohen Macnin of the other part, the said Henry Grua did assign, sell, and transfer unto the said David Cohen Macnin, his executors, administrators, and assigns, all the said outstanding debts and other property due and belonging to the estate of the said Meir Macnin, with full power and authority to ask, demand, sue for, recover, receive, and give effectual receipts, releases, and discharges for the same; to have, hold, receive, and take the said outstanding debts and other property and premises thereby assigned, or intended so to be, unto the said David Cohen Macnin, his executors, administrators, and assigns, to and for his and their own use and benefit absolutely.

There were still moneys due in respect of some of the said bills of exchange and other negotiable paper comprised in the

said indenture of assignment of the 20th of May, 1813, and there were also still in the hands of certain of the official assignees of the Court of Bankruptcy, or other proper officer of such Court entitled to the custody thereof, certain moneys, being dividends in respect of some of the said bills of exchange, promissory notes, and other negotiable paper, and which the legal personal representative of the said William Coles (the intestate) alone could lawfully sue for, recover, receive, or give a sufficient discharge for respectively; but the said Messrs. William and George Coles, and Mrs. Hale, had not, nor had either or any of them, as such next of kin of the said intestate William Coles as aforesaid, any beneficial interest whatsoever in the matters hereinbefore referred to or any part thereof.

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In the Goods of
WILLIAM
COLES.

Dr. Twiss, Q.C., moved for a grant of letters of administration of the personal effects of William Coles, deceased, to be granted to David Cohen Macnin, limited to his right under the said indenture of assignment of the 20th of May, 1813, to the dividends and other money due or to become due or payable in respect of the said bills of exchange and other negotiable paper thereby assigned.

SIR C. CRESSWELL: There are two difficulties in the way of my making the grant. The children of William Coles have not been cited or filed consents to the motion.

Dr. Twiss: The children of the deceased take no interest in this property.

SIR C. CRESSWELL: The next difficulty that occurs to me is, can a person who has bought up a debt after the death of a party, thereby become entitled to a grant of administration of his effects? What is the practice?

Dr. Twiss: A party cannot by buying up a debt due from

1863.

July 14.

In the Goods of
WILLIAM
COLES.

the deceased entitle himself to a grant in the character of a creditor. But the official assignee is not clothed with the character of a mere creditor. The whole of the bankrupt's estate by Act of Parliament vested in him, he is enabled to act in all respects on behalf of the estate; in fact, he represents the bankrupt quoad his estate, and an assignment made by him should be treated as an assignment made by the deceased himself. (*Drew v. Long and others*, 1 Spinks, Eccl. & Ad. Reps. 400.)

SIR C. CRESSWELL: The case must stand over for the next of kin to be cited.

June 23.

The next of kin of the deceased having been cited and not appearing, the motion was now renewed.

Dr. Twiss: Meir Macnin was a creditor of William Coles the deceased. Macnin became bankrupt. His official assignee represents him as if he were alive. The official assignee has sold and assigned the estate of the bankrupt to Henry Grua, who has assigned it over to David Cohen Macnin, who is the only person now interested in the property for which this limited grant is required. He submitted the grant might be made to David Cohen Macnin.

SIR C. CRESSWELL: I have no authority to exercise a discretion in this matter. If I were to make the grant to David Cohen Macnin, the debts due to a bankrupt, after they have been assigned by the official assignee, might be sold twenty times over, and the twentieth assignee might come and ask for the grant. If I had a discretionary power in the matter, and in the exercise of it were to make such a grant, it appears to me that it would be a very inconvenient mode of administering the estate of deceased persons. I must reject the application.

Dr. Twiss now moved the Court to decree a grant of administration, limited to the dividends and other money due or to become due and payable in respect of the bills of exchange and other negotiable paper assigned to Meir Macnin by the indenture of May 20th, 1813, to Mr. Henry Grua, the assignee of the official assignee of Meir Macnin's (the bankrupt) estate. The assignment of these debts was made to him under the authority of the Court of Bankruptcy, and by the 137th section of the Bankruptcy Act (1861), (24 & 25 Vict. c. 134), when the debts of a bankrupt have been assigned by the official assignee to a purchaser, such purchaser shall, by virtue of the assignment, have power to sue in his own name for the debts assigned to him, as effectually as the assignee himself. He submitted that the words of this section were sufficient to authorize the Court to make the grant prayed.

1863.

July 14.

In the Goods of
WILLIAM
COLES.

SIR C. CRESSWELL decreed the grant to Mr. Henry Grua as prayed.

MOSS AND OTHERS *v.* BARDSWELL (on opposed Motion).

1860.

March 19 and
April 25.

Will.—Executor.—Trustee.—Power to Appoint other Trustees.

MOSS AND
OTHERS
v.

BARDSWELL.

B. made C. his executor and trustee, with power to appoint by deed or will other persons as co-trustees or succeeding trustees. B died, C. did not take probate, but by will, referring to B.'s will, appointed E. and F. to be succeeding trustees in respect of B.'s will, after his (C.'s) death. F. proved C.'s will, and was called upon, as executor substituted according to the tenor, to take probate of B.'s will.

The Court held, that in the language of the two wills the distinction between trustee and executor was so marked, that F. could not be called upon to take probate of B.'s will.

Henry Davies (therein described as of New Park, in the

1860. county of Tipperary), by his will, dated the 21st of June, 1856, devised and bequeathed all his property, real, freehold, or personal, to his brother William Davies, his heirs, executors, administrators, and assigns, upon certain trusts. And he authorized his brother "to appoint by deed or will, when as he "shall see fit and proper, any other person or persons he shall "think proper, to be a joint trustee with himself, if he shall "think it necessary, or to be a succeeding trustee or trustees, "for the purpose of this my will ;" he also appointed his brother residuary devisee, and legatee, and sole executor. This testator died on 7th January, 1857. William Davies never proved the will.

March 19 and
April 25
—
MOSS AND
OTHERS
v.
BARDSWELL.

William Davies, by his will, dated 12th of August, 1857, devised and bequeathed all his real and personal estate to which he should be beneficially entitled at the time of his decease, or over which he had any power, appointment, or disposition, to Charles Hamilton and James Hamilton Bardswell, whom he also appointed trustees and executors of his will, upon certain trusts, etc. He further devised and bequeathed "unto the said C. H. and J. H. Bardswell, their "executors, administrators, and assigns, all estates which at "the time of my decease shall be vested in me upon any trust, "or by way of mortgage, subject, etc. And whereas, by the "will of my late brother Henry Davies, of New Park, in the "county of Tipperary, whereof I am the sole trustee and executor, I am empowered to appoint by deed or will any other "person or persons I shall think proper, to be a joint trustee "with myself, or to be a succeeding trustee or trustees for the "purpose of the said will ; now I do hereby appoint the said "Charles Hamilton and J. H. Bardswell to be succeeding "trustees after my decease, for the purposes of the said will, "and with all the power and authorities therein expressed "and contained."

William Davies died on the 14th of August, 1857, and his will was proved in the Diocesan Court of Chester (sworn under

£1500) by Bardswell, Charles Hamilton having renounced probate thereof, in October of the same year.

The present application against Mr. Bardswell was made on behalf of a Liverpool banking firm, under the title of Moss and Co.

Prior to 1848, Henry and William Davies carried on business in Liverpool as the firm of Henry Davies and Co., and kept a banking account under the name of H. Davies and Co., with Messrs. Moss. In 1848, Henry Davies and Co. became bankrupt, and a large sum of money was then due from that firm to Messrs. Moss, and till a final dividend was declared, the banking account of Henry Davies was kept open in Messrs. Moss's books.

Messrs. Davies recommenced business after their bankruptcy under the same title, and opened an account with Messrs. Moss, which, for distinction's sake, was kept in the name of W. and H. Davies. It was supposed that in 1854, Henry Davies, as between the partners, retired from the firm; but his name continued to be used in the business till his death in January, 1857, and no notice of dissolution of partnership had been given to Messrs. Moss. In January, 1857, the balance due from Henry Davies and Co. to Messrs. Moss on the banking account was over £10,000, and various railway shares and other securities, belonging to the firm of H. Davies and Co., were held by Messrs. Moss as security. This balance was subsequently altered. At the date of this application, Messrs. Moss claimed a balance of more than £12,000, and stated that certain shares, to the value of about £6290, belonging to the estates of Henry and William Davies, remained in their hands, within the jurisdiction of the Court, subject to the account between themselves and the estates of Henry and William Davies. They also alleged that Henry Davies, at the time of his death, was possessed of other personal estate above the value of £5, within the jurisdiction of the Court, viz. a balance to his credit in the partnership books of Henry Davies

1860.

March 19 and
April 25.

MOSS AND
OTHERS
v.
BARDSWELL.

1860. and Co. to upwards of £10,000. They further alleged that
 March 19 and William Davies never proved his brother's will, but had pos-
 April 25. sessed himself of his assets, or a portion thereof, and had as-
 MOSS AND sumed the duties of executor and trustee, and if alive would
 OTHERS be compellable to take probate.
 v.
 BARDSWELL.

In pursuance of an order made in February, 1860, on motion, upon Mr. Bardswell, who opposed the motion, but was condemned in the costs thereof, the original will of Henry Davies was now in the registry of the Court.

In default of a personal representative to Henry Davies, the plaintiffs, Messrs. Moss, were unable to take necessary proceedings in Chancery to obtain payment of the debt alleged to be due from the estate of Henry Davies, or to confirm their title to the securities in their hands by foreclosing the equity of redemption thereto against the representatives of the said Henry Davies.

Mr. W. D. Griffith moved the Court to order James Hamilton Bardswell to take probate of the will of Henry Davies, or to take out letters of administration to his estate and effects with the said will annexed. He contended that by taking probate of William Davies's will, the defendant had accepted all the trusts therein contained; that this, in conjunction with the terms of Henry Davies's will, would be sufficient to entitle him as substituted executor according to the tenor. He referred to Williams on Executors, 213-14, and cases there cited.

Dr. Phillimore, Q.C. (*Mr. R. Pritchard* with him), *contrà*.

The following authorities were cited:—Williams on Executors, part 1, book iii. ch. ii.; and part 1, book iv. ch. i. s. 2. *Grant v. Leslie*, 3 Phill. 116. *In the Goods of Lighton*, 1 Hagg. Ecc. 235. *In the Goods of Deichman*, 3 Curt. 123. *Jackson and Gill v. Paulet*, 2 Rob. 344. *The King v. Stone*, C. T. R. 395. *Brazier v. Hudson*, 8 Sim. 67.

Cur. adv. vult.

Sir C. CRESSWELL: The question is, whether Bardswell was bound to take probate of the will of Henry Davies because he had proved the will of William Davies. Henry Davies made a will, appointing his brother, William Davies, executor. It appeared also that he had made William Davies, and, I think, his father, trustees under the will for certain purposes, and he gave him power to appoint, by deed or will, substituted trustees to act with him or to succeed him. William Davies, by his will, appointed Bardswell as trustee to act under Henry Davies's will. Bardswell proved William Davies's will; thereupon it was contended that he had accepted the trusts of Henry Davies's will, and that those trusts were of such a character that he was to be treated as executor according to the tenor, and having accepted the trusts of the will, he was bound to prove it. In the first place, Henry Davies began his will by directing that his debts and funeral expenses should be paid; the trusts were not introduced till afterwards. He did not give all his property upon trust for certain purposes, and, amongst others, for the payment of his debts, but began by directing that his debts and funeral expenses should be paid as soon as possible. He then devised and bequeathed his realty and personalty to certain trustees, and then made William Davies executor. He therefore distinguished between the appointment of William Davies as trustee and his appointment as executor. If the will had been in another form, if he had introduced in the first instance the appointment of William Davies as executor, and had then gone on with the trusts, there would have been no pretence for saying that William Davies had anything to do as trustee with the payment of the debts, etc. There is no executor according to the tenor. If William Davies had proved the will, there was no power given to him to appoint another executor to act with him or in substitution, but it is supposed that such a power was given to him incidentally and by reference. But I think that as, if he had proved the will, he would have acquired no

1860.

March 19 and
April 25.MOSS AND
OTHERS
v.
BARDSWELL.

1860. power to appoint an executor, he could not do it by appointing an executor of his own will. I have not the will of William Davies before me, but the effect of it is that he appointed Hamilton and Bardswell trustees of Henry's will; he did not assume to appoint them to be executors, nor do I find that Bardswell has done any act as executor. He is not appointed executor, and has not acted as executor, and cannot be compelled to take probate. Bardswell had to pay the costs of his ineffectual opposition to the motion for the production of the will, and Moss must pay the costs of this ineffectual attempt to make him take probate of it.
- March 19 and April 25. *Moss and Others v. Bardswell.*

Motion rejected.

1863. In the Goods of M. A. E. J. STEWART (deceased).

March 17.

Probate.—Incorporation of Unattested Paper.

In the Goods of
M. A. E. J.
STEWART.

The deceased duly executed a Will and two Codicils. The Will contained the following clause:—"I direct my executors to distribute . . . all pictures, books, and other articles according to any list or lists signed by me." A paper was found, without any date, but which was executed before the second Codicil, headed "List referred to in my Will and Codicils." By this paper a picture was given to a nephew; wearing apparel, one year's wages, and mourning to a servant; and directions to the executors as to the inscriptions on the tombstone. The *second* Codicil commenced:—"This is a Codicil to the last Will and testament, with other Codicils annexed, of me. . . . I hereby confirm my said last Will, with all the Codicils thereto duly signed by me."

Held, that the unattested paper was sufficiently identified and referred to in the Will, and having been signed before the execution of the Codicil, was entitled to be admitted to probate as a portion of the Will confirmed by the Codicil.

Mrs. Mary Ann Elizabeth Jane Stewart, widow, formerly of No. 33, Upper Brunswick Place, Brighton, Sussex, died at

Pau, in France, on the 6th of January, 1863, having made a will, dated the 24th of May, 1861; a codicil, dated the 23rd of September, 1861; and a second codicil, dated the 29th of November, 1862. She appointed the Rev. Thomas Graham Smyth and Charles Stewart, Esq., executors. By her will she gave (amongst other bequests) to her nephew, Thomas Bendyshe, the picture of her father in uniform, and her German and Italian books; and she directed her executors as follows:—"I direct my executors to distribute to the parties whose names may be inscribed upon the same, such packets as I may leave for that purpose; and also all pictures, books, and other articles according to any list or lists signed by me." Several packets were found so inscribed, but no application was made to the Court in reference to them. The only paper answering the description contained in the latter part of the above clause was in the handwriting of Mrs. Stewart, and signed by the deceased before the 29th of November, 1862. It was unattested, and was as follows:—"List referred to in my will and codicils. I give to my nephew, Thomas Bendyshe, barrister-at-law, my father's portrait in uniform. I desire that the following inscription may be placed on my tombstone:—viz. S. T. M. of Mary, widow of the late Captain William Stewart, of the Royal Artillery, and only daughter of Richard Bendyshe, Esq., of Barrington Hall, in the county of Cambridgeshire. 'Even as they that sleep in Jesus shall God bring with him.' The tomb to be like dear William's, in railing, etc. etc. I give to my maid, Eliza Matthews, all my common wearing apparel, except shawls, dresses, or other things. I also direct she may have a suit of mourning, and that her expenses may be paid to her own home, in case she shall desire to return to England; also that she may be paid a full year's wages over and above what may be due at the time of my death. All this in addition to the legacy of five pounds, provided she be in my service at the time of my decease.—

1863.

March 17.

In the Goods of
M. A. E. J.
STEWART.

1863. "Mary Stewart. I desire to be buried in the same grave with
 March 17. "my late husband, William Stewart, in the Cimetière de Mont-
 In the Goods of "martre, at Paris.—Mary Stewart." The instructions for
 M. A. E. J. this paper were also found in the handwriting of Mrs. Ste-
 STEWART. wart, headed "Mem^m, Pau, February 2, 1862." The codicil,
 dated the 29th of November, 1862, commenced,—“This is
 “codicil to the last will and testament, with other codicils an-
 “nexed, of me, Mary Ann E. J. Stewart, widow, now tem-
 “porarily residing at Pau, France. I hereby confirm my
 “said last will, with all the codicils thereto, duly signed by
 “me, excepting as follows,” etc. No other testamentary pa-
 pers were found.

Dr. Middleton moved the Court to decree probate of the will and two codicils, together with the unattested list, as together containing the will of the deceased. The list was sufficiently identified by the will, and was in existence when the will was confirmed by the second codicil. [He cited *In the Goods of the Rev. George Hunt* (2 Robert. 622).]

SIR C. CRESSWELL: The list hardly conformed to the description of it in the will, but I think the decision of Sir John Dodson's is sufficient to authorize me to grant probate of it as a portion of the will confirmed by the codicil of the 29th of November, 1862. But for that decision I should have had considerable doubts about granting the motion.

1863.

May 12.

In the Goods of
 THE MARQUIS
 OF LANSDOWNE.

In the Goods of THE MARQUIS OF LANSDOWNE (deceased).

Embodying in Probate Documents referred to in Will.—
Practice.

L. by his Will bequeathed certain leaseholds to trustees upon the

* But see a later case. *In the Goods of Lydia Mathias*, 3 Swab. & Tris. p. 100.

same trusts as declared in a certain indenture of settlement. With a slight exception, the whole of these leaseholds were included in the settlement, which was of great length. The Court granted probate without requiring the settlement to be embodied in it, upon an affidavit being filed describing and giving the date of the settlement.

1863.

May 12.

In the Goods of
THE MARQUIS
OF LANS-
DOWNE.

The Marquis of Lansdowne died on the 31st of January, 1863, leaving a will, dated the 10th of June, 1862, and two codicils. The will, among other things, bequeathed certain leasehold property to trustees, upon the same trusts as were declared in and by an indenture of settlement dated the 18th of March, 1834.

This indenture had been enrolled in the Court of Chancery, and was of great length, the trusts alone taking up about 150 folios.

The only part of the leasehold property not included in the said indenture was part of the site of Lansdowne House.

Dr. Spinks moved for probate of the will and codicils, without embodying in the probate the indenture of settlement. The ordinary practice of the registry might require the settlement to be engrossed, but the Court may, according to circumstances, exercise a discretion in such matters.

SIR C. CRESSWELL: I will grant this application. The whole subject of embodying in a probate documents referred to in the will is difficult and embarrassing. It was discussed in *Sheldon v. Sheldon*, 1 Rob. 81, by Dr. Lushington, who there says that he, when at the bar, communicated privately on the subject with Sir J. Nicholl, who stated his opinion that the embodying documents in a probate should not be required when the expense would be great. Dr. Lushington also, in that case, points out the distinction between cases in which documents *may*, on the application of the parties, and those in which they *must* be set out in the probate. That

1863. distinction seems to me to apply to the present case. If the Marquis of Lansdowne had merely directed that the leaseholds should be disposed of according to the trusts declared in the indenture, the leaseholds would have vested in the executors, who would have required a knowledge of those trusts in order to perform their duty, and it might, on that account, have been necessary that the trust-deed should be embodied in the probate; but he gives the leaseholds to trustees, and they must see the trusts duly executed. Therefore, for the reason given by Sir John Nicholl and that assigned by Dr. Lushington, I shall grant the application, on an affidavit being filed in the registry, giving the date and a description of the deed enrolled.

May 12.
In the Goods of
THE MARQUIS
OF LANDS-
DOWNE.

In *Sheldon v. Sheldon*, Dr. Lushington, in commenting upon the case in the House of Lords, points out that it was in the discretion of the House of Lords to have sent back the probate to be amended by engrossing in it a document referred to and not embodied in it, and that in the event of litigation it might be sometimes necessary to adopt that course. I do not see that this would be necessary if there were litigation in this case. Probate may go as prayed, upon the affidavit I have mentioned being filed.

In the Goods of MARY BUDD, widow (deceased).

1862.
April 16.

In the Goods of
MARY BUDD.

Two Wills partially Inconsistent. — Probate. — Practice. — Stoddart v. Grant and others, 1 Macq.'s H. of Lords' Cases, 169.

Where a testator executed two Wills partially consistent and partially inconsistent, by the first Will disposing of certain property over

which she had a power of appointment, bequeathing certain legacies and the residue, and appointing W. H. and J. H. executors; and by the second Will, which contained no revocatory clause, bequeathing certain specific legacies, disposing of the residue, and appointing the said J. H. and two other persons executors: The Court granted probate to the said J. H. of the two instruments, so far as they were not inconsistent, reserving power to W. H. and the two other executors appointed in the second Will to come in and take probate.

1862.

April 16.

In the Goods of
MARY BUDD.

Mary Budd, late of Calne, in the county of Wiltshire, died on the 25th of December, 1861. Under the will of John Tuckey (her father) she had a special power of appointment, by will or deed (in the events which have happened), over the sum of £2000. By deed-poll dated the 22nd of March, 1859, she made an absolute appointment of one moiety of the above £2000. By a will dated the 13th of April, 1860, she made an absolute appointment of the remaining moiety of the above £2000 to her sister, who is still living, Mrs. Jane Hodgson, if she should survive her. This will also contained several specific legacies and a disposition of the residue of the estate, and she appointed "William Hodgson and John Henderson "executors of this her will." The deceased subsequently executed another will, dated the 10th day of June, 1861, also containing several specific bequests and a disposition of the residue of her estate, and "she thereby appointed Richard "Tuckey, John Henderson, and Broome Pinniger, executors "of this her will." This will commenced,—“This is the last “will and testament of me, Mary Budd;” but it contained no reference to the former will or to the power of appointment given her by her father’s will, or any clause expressly revocatory of former wills or revocatory of the appointment of executors contained in her former will.

Mr. Pritchard moved the Court, on behalf of Mr. John Henderson, for probate of so much of the will of the 13th of April, 1860, as related to the exercise of the power of ap-

1862.
April 16.
In the Goods of
MARY BUDD.

pointment therein referred to, and of the will of the 10th of June, 1861, to be granted to Mr. John Henderson, as one of the executors. They were two partially inconsistent instruments. It had been decided by several cases that a subsequent will inconsistent with the provisions of a former will, though it contained no express revocatory clause, would revoke such former will. (*Helyar v. Helyar*, 1 Lee, 472; *Plenty v. West*, 1 Robert. 264; *Cutto v. Gilbert*, 9 Moo. P. C. C. 131; *Hughes v. Turner*, 4 Hagg. 52.) It was for the Court to decide whether the last will was or was not revocatory. (*Brenchley v. Lynn*, 2 Robert. 441.) The two documents were only partially inconsistent; but in so far as they were consistent, the Court, he submitted, should grant probate of them as together containing the last will of the deceased. (*Stoddart v. Grant and others*, 1 Macqueen's H. of Lords' Cases, 169, 170.)

SIR C. CRESSWELL: I do not see any difficulty regarding probate of both on the terms asked.

Dr. Spinks, for Mr. Tuckey and Pinniger, asked for probate of the last will only. William Hodgson, who was named executor in the first will, was not named an executor in the second will. From this it might be inferred that the deceased did not intend the first will to operate. The omission to name him an executor in the second will was at least an implied revocation of his appointment.

SIR C. CRESSWELL: I think I ought to grant probate of the two instruments to Mr. John Henderson, as prayed, with power reserved to the three other executors to come in and take probate.

1862.

November 18.

In the Goods of His late Majesty KING GEORGE III.

Sovereign's Will.—Jurisdiction.

In the Goods of
His late Majesty
King George
the Third.

The Court of Probate has no authority to inquire into the validity or invalidity of the Will of a Sovereign of this realm.

In the year 1822 an application was made to the Prerogative Court of Canterbury, on behalf of a person who styled herself Her Highness Olive, the natural and lawful daughter of his Royal Highness Henry Frederick, the then late Duke of Cumberland, deceased, whilst living, the natural and lawful brother of his late Majesty King George III., for permission to cite Iltid Nicholl, Esq., the then King's Proctor, for and on behalf of his late Majesty King George IV., as heir and successor of his late Majesty King George III., to see the last will and testament or testamentary schedule of his Majesty King George III., propounded and proved in solemn form of law. Sir J. Nicholl, the then Judge of the Prerogative Court, rejected the motion, on the ground that he had no jurisdiction to issue such a citation. (1 Add. 255.) The document which it was intended to propound was in these terms:—

“GEORGE R.

“St. James's.

“In case of our royal demise, we give and bequeath to
“Olive, our brother of Cumberland's daughter, the sum of
“£15,000, commanding our heir and successor to pay the same
“privately to our said niece for her use, as a recompense for
“the misfortunes she may have known through her father.

“June 2, 1774.

“Witness, J. DUNNING.

“CHATHAM. WARWICK.”

Mrs. Olive Serres, widow, the person above mentioned as Princess of Cumberland, died on the 21st of November, 1834, having made her will, dated the 5th of July, 1834, and therein appointed her daughter, Lavinia Jeanette Horton Ryves, widow, one of her executors.

1862. *Mr. Gibbons*, on behalf of *Mrs. Ryves*, now asked for permission to cite *Arthur Richard*, Duke of Wellington, as personal representative of the late *Arthur*, Duke of Wellington, whilst living the surviving executor of his late Majesty King George IV., the heir-at-law of his late Majesty King George III., and also her Majesty's Attorney-General, as representative of her present Majesty, the heir-general of his late Majesty King George IV.

November 18.
In the Goods of
His late Majesty
King George
III.

SIR C. CRESSWELL: The present Duke of Wellington is in no way the representative of King George IV., inasmuch as he is not executor, but administrator only (the will being annexed to his administration) of his late father.

Mr. Gibbons said he would limit the motion to citing her Majesty's Attorney-General.

SIR C. CRESSWELL: This question was decided by Sir J. Nicholl in 1822, and I am in no way inclined to disturb his decision. I consider I have no jurisdiction in the matter. I reject the motion.

1859. **GWILLIM AND ANOTHER v. GWILLIM AND OTHERS (COLLINS AND OTHERS cited to see proceedings).**

November 4.

GWILLIM
v.
GWILLIM.

Will.—Acknowledgment.—Memory of Attesting Witnesses Defective.—Due Execution Presumed.

Where the attesting witnesses to a Will duly executed on the face of it did not recollect having seen the testator's signature to the Will when they subscribed their names as witnesses, the Court held that it was at liberty to judge from the circumstances of the case, whether it was probable that the testator's name was on the Will or not at

Archd.
1 P20 379
Black
1 N 27. 11. 59
2 P20 1
Sanctam. r. n P20 102 N. 11. 11
Wh 25 26 07

the time of the attestation, and being of opinion that it was, pronounced for the Will.

1859.

November 4.

In this case, the will of the Rev. John Gwillim, who died on the 16th of May, 1859, was propounded by the plaintiffs as the executors named therein ; and its validity was contested by the defendants, as the persons entitled in distribution to his effects in the event of his having died intestate, on the ground that it was not executed according to the provisions of 1 Vict. c. 26.

GWILLIM
v.
GWILLIM.

Elizabeth Collins, who, with others, was cited to see proceedings, also contested its validity on the same ground.

The cause was heard before Sir C. Cresswell. The will was written on the first two sides of a sheet of letter-paper, and was headed "October 6, 1853." On the top of the third side was written,—

" 1856

" Mch. 31

" My Will and Testament.

" Brange

" Mch. 31, 1856

" JOHN GWILLIM.

" Witnesses

" E. R. GWILLIM

" HARRIET GWILLIM."

On the fourth side of the sheet was written,—

" Will, 1857."

The evidence was as follows :—

HARRIET GWILLIM : " I am the widow of a brother of the deceased. My sister, E. R. Gwillim, the widow of another of his brothers, was, in March, 1856, living at 'The Brange,' near Sedbury, and I was on a visit to her. In that month the deceased came on a visit there. His visit continued a fortnight. One evening during his visit he produced a paper to myself and Mrs. E. R. Gwillim. We were then in the breakfast room. No one else but we three were present. He came into the room, and requested us to sign his will. I don't

1859. remember whether this was before or after he produced the
November 4. paper; I know nothing that was done, except our signing it
and his leaving the room afterwards. I signed the paper.
GWILLIM Elizabeth signed first. (Will produced.) I see my signature
v. there. That was the paper I then signed. I and Elizabeth
GWILLIM. both signed it at the same time, whilst deceased was in the
room. After we had signed, he left immediately. He took
the paper in his hand. The interview lasted about ten mi-
nutes. I didn't see whether deceased wrote the word will at
the time. I never witnessed a will before. After we had signed
the document, the deceased made no observation to us. The
will was not signed by the deceased in my presence."

Cross-examined : " The will was not folded down."

BY THE COURT : " I don't recollect noticing any writing on
the same side of the will as that I signed. I don't recollect
the day of the month. I think it was in March, 1856. I
signed my name in that part because it was under my
sister's."

ELIZABETH R. GWILLIM : " In March, 1856, the deceased
asked me to sign a paper. The paper was then on the table.
I did not see him put it on the table. I was by the window,
and the table was by the fire. He said nothing about the
paper before he asked me to sign it. I had not noticed the
paper before he asked me to put my name to it. I saw it for
the first time when I sat down to sign it. An inkstand, which
usually stood on a cheffonier in another part of the room, was
on the table. I did not sign my name under anything else.
The deceased told me where to write my name. I believe the
will was folded as it is now. (The first sheet, on which the
will was written, was folded back.) I cannot recollect if the
word ' witnesses ' was there when I signed my name. I don't
know whether ' John Gwillim ' was there when I signed. I
cannot say it was not. I did not know what it was. I did
not ask. He was a close man. I can't say if the inkstand
was there when he came in."

Mr. Manisty, Q.C. (with him *Dr. Tristram* and *Mr. Pritchard*), for the defendants, contended that as the deceased did not sign in the presence of the witnesses, in order to make out that there was an acknowledgment in their presence, it should appear that his signature was on the will when the witnesses signed; but that there was nothing on the face of the paper, nor any facts which would lead to such a presumption. (*Shaw v. Neville*, 1 Jur. N. S. 408; *Ilott v. Genge*, 4 Moo. P. C. 265; and *Blake v. Knight*, 2 Notes of Cases, 337.)

1859.
November 4.
Gwillim
v.
Gwillim.

Dr. Phillimore, Q.C., argued on the same side for the intervenor.

Dr. Deane, Q.C. (with him *Mr. Hawkins* and *Dr. Wambey*), submitted that the reasonable inference from the evidence was, that the testator must have known that it was requisite that he should first sign, and therefore that he did so. He knew two witnesses were requisite, produced a paper, correctly dated, to them, asked them to sign his will, and told them where to sign; that if the witnesses had been dead, the presumption would have been *omnia rite esse acta*; and that, as they were unable to say whether or not the deceased's signature was there,—their memories as to that being merely blank,—they might be considered as dead.

Cur. adv. vult.

SIR C. CRESSWELL: This case stood over in order that I might have an opportunity of looking over the case of *Lloyd and Hart v. Roberts*,¹ decided by the Judicial Committee. Mr. Moore has been kind enough to furnish me not only with the printed papers in it, but also with notes of the judgment of Dr. Lushington. The question in the present case is, as to the due execution of the will of the Rev. John Gwillim. The

November 11.

¹ Since reported; see 12 Moo. P. C. C. 158.

1859. will appears, on the face of it, to have been regularly executed. It is rather a curious document. Part of it seems to have been written at one time and part at another. On the third sheet is written,—“1856—Mch. 31.—My last Will
November 4. and Testament;” then underneath that, “Brange—Mch. 31,
Gwillim “1856—John Gwillim;” and at one side of it the names of
v. the two attesting witnesses, “Elizabeth R. Gwillim” and
Gwillim. “Harriet Gwillim.” These are two old ladies, who are related by marriage to the Rev. John Gwillim, the testator, being the widows of his two brothers. They state that about the time when the will purports to have been executed, they were all together at a house called Brange, belonging to Mrs. E. Gwillim; that the alleged testator one morning came into the room where they were sitting, and asked them to witness his will. They state that they did accordingly write their names as he told them, but neither of them recollected seeing his name on the paper at the time. They do not deny that it was there, but they say they do not recollect seeing it there. One of them, Harriet, states that when he asked them to witness the will, he was at a table near the fire, and that when she looked at the table the will was on it, and also an inkstand, which generally stood on a cheffonier in another part of the room. If the attesting witnesses to a will are dead, the presumption is that everything has been rightly done. But these ladies, who are the witnesses to this will, not being dead, I will not say that everything must be assumed not to have been rightly done that they do not remember to have seen. The objection to the execution was, that there seemed to have been an imperfect acknowledgment of the signature. If it were necessary to have direct evidence that the name of the testator was on the will, when he acknowledged it by asking them to witness his will, the proof or the execution would fail; but that certainly is not necessary, for the contrary was decided in *Cooper v. Bockett*, 4 Moo. P. C. C. 419. The other case in the Judicial Committee to which I

have alluded, went a great deal further, because there the only surviving attesting witness denied the existence of a will at the time of the attestation. In that case, *Lloyd and Hart v. Roberts*, one of the two attesting witnesses was dead; there was an imperfect attestation clause, and the other attesting witness was examined. He stated, at first, that he was asked by the testator to witness his will, but afterwards, on being cross-examined as to whether the testator himself asked him, he said that a female servant of the testator had come and said to him that the testator wanted him to witness the will. He further stated that on entering the room he saw a paper, and on that paper he saw the name of the testator in the testator's handwriting, so far proving affirmatively the existence of the signature; but he went on to state that the attestation was not there, and, further, that nothing whatever was written above the testator's name. The will, a very short one, was, in fact, written above the testator's name, and therefore the witness denied the existence of the will at the time when the signatures were attached to it. But from the whole circumstances of the case, the Judicial Committee were perfectly satisfied that the will was there at the time, and that it was probably duly executed.

That case goes a good deal further than this. I am, therefore, at liberty to judge, from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not also know that he must sign it before they did, and either sign it or acknowledge it in their presence. Then if I look at the position of the words, I find at the top of the third page, "My will and testament, 1856, March 31st." Under that comes "Brange, March 31st, 1856," that being the time and place at which the old ladies say they were asked to sign the will. Under that comes "John Gwillim," and then the word "witness," a little below on the left-hand side,

1859.

November 4.

GWILLIM
v.
GWILLIM.

1859. where one would expect to find it. I cannot, therefore, but
November 4. think that the name of the testator was written at that time,
and that by asking those old ladies to witness his will, he did
acknowledge his signature.
GWILLIM
v.
GWILLIM.

Mr. Manisty applied for costs of the opposition out of the estate.

SIR C. CRESSWELL allowed the costs of all the parties to be paid out of the estate.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

LAWRENCE v. LAWRENCE.

*Dissolution of Marriage.—Order as to Settled Property.—
Notice of Application.*

1863.
February 24.
———
LAWRENCE
v.
LAWRENCE.

After a decree *nisi* for dissolution of marriage the petitioner filed a petition praying for an order to vary a marriage-settlement. Before the decree was made absolute, the respondent was served abroad with a copy of the petition, and with a notice that after the decree was made absolute, the Court would be moved to make the order as to the settled property. The respondent had not appeared at any stage of the proceedings:

HELD, that the Court had power to vary the marriage-settlement in the absence of the respondent.

This was the wife's petition for dissolution of marriage, on the ground of the husband's adultery and desertion. The respondent did not appear. On the 11th of June, 1862, the Judge Ordinary made a decree *nisi*, which was made absolute on the 27th of January, 1863. After the decree *nisi* had been made, the petitioner filed a petition praying for an order as to settled property. A copy of this petition, before the decree was made absolute, was served upon the respondent in

1863. New Zealand, notice being at the same time given to him that
February 24. after the decree had been made absolute the present applica-
LAWRENCE tion would be made.

v.
LAWRENCE.

Dr. Wambey (Dr. Deane, Q.C., and Mr. Browning with him) now moved, under the 5th section of 22 & 23 Vict. c. 61, to make such order.

THE JUDGE ORDINARY: It appears that not only notice of the intended application was given to the respondent, but that a copy of the petition praying for an order as to the settled property, was also served on him. I think that is sufficient to enable me to entertain the application in the absence of the respondent. If a petition had not been filed, I think that notice of the petitioner's intention to apply to the Court would hardly have been sufficient. His Lordship then made an order as to the application of the settled property.

March 24.

DART v. DART.

DART
v.
DART.

Judicial Separation by Reason of Wife's Cruelty.—Provision for Wife.

The Court has no jurisdiction to order that a husband who obtains a decree of judicial separation by reason of his wife's cruelty, should make any provision for her maintenance.

This was the husband's petition for judicial separation on the ground of cruelty. The respondent denied the cruelty, pleaded provocation, and a counter-charge of cruelty. The issues joined on these pleas were tried by a common jury, who found a verdict for the petitioner. The case had been adjourned for formal proof of the marriage.

Dr. Wambey now tendered the requisite proof, and asked for decree of judicial separation.

1863.

March 24.

DART
v.
DART.

Mr. G. C. Clarkson, for the respondent, asked the Court not to pronounce the decree except on condition that the petitioner should make some provision for the respondent. In *White v. White*, 1 Swab. & Tris. 591, the Court held that where a judicial separation is decreed on the ground of the cruelty of the wife, she is not entitled to permanent alimony. I do not ask for alimony, but submit that the Court has a discretionary power to grant the decree of judicial separation, and that under the circumstances it would be reasonable to make it only on condition of some provision being made for the wife. The wording of the 16th section of the Divorce Act does not make it imperative on the Court to make a decree: "a sentence of judicial separation may be obtained either by husband or wife." I must admit that there is no precedent to show that the Ecclesiastical Court ever granted alimony in such a case; but there is nothing to show that they would have refused to do so. If the Court has the power, it is a reasonable case for its exercise. The wife brought her husband some property, and if no provision is made for her, she will be thrown on the parish.

THE JUDGE ORDINARY: I think I have no jurisdiction to grant alimony to a wife who is separated from her husband on the ground of her cruelty. I should not have been sorry to have found that I had jurisdiction, but I have not, and I do not agree with the maxim, *boni judicis est ampliare jurisdictionem*. I therefore decree a judicial separation, and make no order as to alimony.

1863.

March 24.

SUTHERLAND
(falsely called
CROMIE)

v.
CROMIE.

SUTHERLAND (falsely called CROMIE) v. CROMIE.

Entitling Affidavits.—Practice.

Affidavits in a cause must be entitled strictly as the cause itself is entitled.

This was the woman's petition for a decree of nullity of marriage. The respondent was served with the citation and copy petition in North America; but the affidavit of service was entitled *Sutherland v. Cromie*.

Dr. Swabey, on moving for directions as to mode of trial, contended that the variance between the title of the affidavit and that of the cause, in consequence of the omission in the former of the words "falsely called Cromie," was immaterial, as being only a descriptive addition.

THE JUDGE ORDINARY held the variance to be material, and rejected the affidavit.

March 24.

SPILSBURY
v.
SPILSBURY.

SPILSBURY v. SPILSBURY.

Pleading.—Amendment.—Re-service.—Practice.

Adultery as the ground of a petition should be distinctly alleged. It is not sufficient that the petition alleges information and belief of the petitioner that the respondent has committed adultery. When leave to amend such a petition is granted, where there has been no appearance, it must be re-served.

This was the husband's petition for dissolution of marriage by reason of the wife's adultery. The petition contained no

direct averment of adultery, but alleged that the petitioner was informed, and believed, that the respondent had committed adultery. The respondent had not appeared.

1868.

March 24.

SPILSBURY

v.

SPILSBURY.

Dr. Spinks, for the petitioner, moved to amend the petition by charging adultery in distinct terms.

THE JUDGE ORDINARY: The petition may be amended, but it must be re-served as amended.

SPERING v. SPERING.

April 21.

Suit for Restitution.—Agreement to live separate.

SPERING

v.

SPERING.

An agreement between husband and wife to live separate is no bar to a suit for restitution of conjugal rights.

This was the wife's petition for a decree of restitution of conjugal rights. The husband's answer alleged, among other matters, that he and his wife had agreed to live separate, and that he should make the wife an allowance; that in accordance with such agreement they had for several years lived separate, and that the allowance had been duly paid.

Demurrer.

Dr. Spinks: An agreement to live separate is no answer to a suit for restitution of conjugal rights. [THE JUDGE ORDINARY: Has not a great authority held that it is?] *Hunt v. Hunt*, 31 L. J. N. S. Prob. Mat. 172, in which the present Lord Chancellor restrained by injunction the petitioner in a suit for restitution from proceeding here, differs from the present case, which is a bare agreement between husband and wife to live separate. In *Hunt v. Hunt* there

1863. was a formal separation deed, and the husband covenanted
 April 21. with trustees that he should not compel his wife to live with
 him.

SPERING

7.

SPERING.

Dr. Swabey, for the respondent, said that, as he understood the L. C.'s judgment, the present answer could not be sustained. In *Hunt v. Hunt*, though he restrained the individual, the L. C. admitted that even a formal separation deed was, in the Matrimonial Court, no answer to a suit for restitution.

THE JUDGE ORDINARY: Then there will be judgment for the petitioner on the demurrer.

April 21.

STONE *v.* STONE AND APPLETON.

STONE
v.

STONE AND
 APPLETON.

Practice.—Notice of Application for New Trial.—Decree Nisi.

When the petitioner in a suit for dissolution has obtained the verdict of a jury, it is no ground for refusing to make a decree *Nisi* that notice of an intended application for a new trial has been given.

This was the husband's petition for dissolution of marriage, on the ground of the wife's adultery, and for damages. The respondent denied the charge. The co-respondent did not appear.

The issue was tried before the Judge Ordinary by a special jury, who, on the 28th of March, 1863, found that the respondent had committed adultery with the co-respondent, and assessed the damages at £2000.

The Queen's Advocate (*Mr. H. Lopes* with him) now moved for a decree *nisi*.

Mr. R. Searle, for the respondent : Notice has been given that the respondent intends to apply for a new trial. Until that application has been disposed of, the decree *nisi* should not be pronounced. In *Lewis v. Lewis*, 2 Sw. & Tr. 394, the Court said that it doubted whether, after a decree *Nisi* had been pronounced, it had power to dismiss the petition upon the application of the parties. If in this case a new trial should be granted, and the respondent should obtain a verdict, the decree *Nisi* on the present verdict would still remain, and might cause embarrassment.

1863.

April 21.

STONE

v.

STONE AND
APPLETON.

THE JUDGE ORDINARY : I think that in such a case the decree *Nisi* would occasion no difficulty, as it would be done away with altogether. I pronounce a decree *nisi*, and condemn the co-respondent in costs.

BAKER v. BAKER.

March 18.

Evidence.—Cross-examination of Petitioner as to Matters not in Issue.—Evidence in Contradiction.

BAKER

v.

BAKER.

A respondent who, in his answer, simply denies the cruelty charged in a petition, may cross-examine the petitioner, if called, as to her general conduct, for the purpose of impeaching her credit, but her answer as to any matters not bearing upon the issue cannot be contradicted.

This was a suit by a wife for dissolution of marriage on the ground of adultery, coupled with cruelty and desertion.

The respondent denied the cruelty and desertion, and alleged that the petitioner had been guilty of adultery.

Issue having been joined, the cause came on now for trial, before the Judge Ordinary, by a jury.

1868. *The Queen's Advocate* (Sir R. Phillimore, Q.C.) and *Mr. R. Pritchard* for the petitioner.

March 18.
BAKER
v.
BAKER.

Dr. Spinks, Mr. Sleigh, and Mr. Searle for the respondent.

Dr. Spinks, in cross-examining the petitioner, who was examined in support of the charge of cruelty, asked her if she had ever been guilty of violence towards the respondent.

The Queen's Advocate objected. The question is inadmissible, as the respondent has not recriminated cruelty or provocation.

Dr. Spinks: If the petitioner should admit that her conduct has been as violent as that of the respondent, and has caused his violence, the plea denying the cruelty would be proved. If she denies that she has been violent, and I can show that she has, her credit will be impeached.

THE JUDGE ORDINARY: The petitioner may be cross-examined as to matters not in issue for the purpose of testing her credibility, but her answers to such questions will be conclusive, and you cannot call witnesses to contradict her.

The petitioner was then cross-examined as to transactions which were not charged in the petition. The Court refused to allow her statements with reference to them to be contradicted.

June 2.

NICHOLSON v. NICHOLSON AND RATCLIFFE.

NICHOLSON
v.
NICHOLSON
AND
RATCLIFFE. *Dissolution of Marriage.—Wife's Costs.—New Trial on Wife's Application.—Husband to pay Costs on both sides.—Alimony pendente lite.*

Where a new trial is granted on the application of the wife, the Court

cannot impose upon her the terms of payment of costs, if she has no means, but the husband must pay the costs of both parties. In such case, alimony *pendente lite* continues without any fresh order.

1868.

June 2.

NICHOLSON
v.
NICHOLSON
AND
RATCLIFFE.

This was the husband's petition for dissolution of marriage. The co-respondent did not appear.

The respondent appeared and denied the adultery, and also charged the petitioner with cruelty.

On the 12th of March these issues were tried by a jury, who found that the respondent had been guilty of adultery, and that the petitioner had been guilty of cruelty.

THE JUDGE ORDINARY, after taking time to consider, on the 24th of March granted the decree *Nisi*. He said that it appeared that the respondent, with the assistance of others, had plundered the petitioner to a considerable extent. The petitioner's violence had been caused by his wife's misconduct, and had not led to her adultery; he was therefore entitled to a decree.

Mr. Littler (*Mr. C. Russell* with him), on behalf of the respondent, obtained a rule *nisi* for a new trial, upon affidavits, against which

The Queen's Advocate (Sir R. Phillimore) and *Mr. Digby* showed cause.

THE JUDGE ORDINARY, after taking time to consider, now made the rule for a new trial absolute.

Mr. Littler: Will there be a new trial also as to the cruelty?

THE JUDGE ORDINARY: Yes; I was much dissatisfied with the verdict upon that issue.

Mr. Littler: Will it be necessary to get another order for alimony? Alimony *pendente lite* has been allotted.

1863. THE JUDGE ORDINARY: No. The order for payment of
June 2. alimony *pendente lite* will still remain in force.

NICHOLSON
v.
NICHOLSON
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RATCLIFFE.

The Queen's Advocate: Will the new trial be granted on the terms of payment of costs?

THE JUDGE ORDINARY: I cannot make the wife pay the costs of the first trial; the husband must pay the costs of both parties. The husband's liability for the wife's costs is a subject which has caused me much embarrassment and anxiety; but it would be a mere mockery to grant a new trial upon the terms of payment of costs by a wife who has no means.

The Queen's Advocate: Will the husband be liable for costs to a greater amount than that for which he has given security?

THE JUDGE ORDINARY: At present he will not; but hereafter an application that he give security for a further amount may be made.

July 7.

SMITH v. SMITH.

SMITH
v.
SMITH.

Practice.—Respondent cited by Advertisement.—Amendment of Petition.—Advertising amended Petition.

Where a respondent is cited by advertisement, and leave to amend the petition is afterwards granted, the amended petition need not be advertised.

This was a suit, by a husband, for dissolution of marriage. Personal service on the respondent was dispensed with, and the petitioner had obtained leave to proceed without making

a co-respondent. The respondent had been cited by advertisement, but had not appeared. The petition was heard by the Judge Ordinary in Hilary Term, 1863, but the hearing was adjourned for further evidence as to the adultery.

1863.

July 7.

SMITH

v.

SMITH.

Mr. Searle, on behalf of the petitioner, moved for leave to amend the petition by inserting charges of adultery which had come to the knowledge of the petitioner since the petition had been filed.

THE JUDGE ORDINARY granted the motion.

Mr. Searle: I presume it will not be necessary to serve the petition or advertise it.

THE JUDGE ORDINARY: You cannot serve it, as you cannot find the respondent. I think it is not necessary to advertise the amended petition, inasmuch as it is the practice to advertise the citation only, and not the petition, and the citation does not specify the charges of adultery.

BROWN v. BROWN AND SIMPSON.

July 14.

Alimony.—Refusal to allot Alimony where Husband's Property is small.

BROWN

v.

BROWN AND
SIMPSON.

Where the husband had no property, and his only property was a legacy of £500, not payable until eleven months after the application for alimony, the Court refused to allot alimony *pendente lite*.

Mr. Pritchard, on behalf of the wife, moved for allotment of alimony *pendente lite*. It appeared from the husband's answer that he had no income, being maintained by his

1863.
July 14.
BROWN
v.
BROWN AND
SIMPSON.

father in return for his services in his father's business; but that under the will of a deceased uncle, he was entitled to a legacy of £500, payable twelve months after the death of his uncle, which took place on the 31st of May, 1863. The legacy has a marketable value, and alimony should therefore be allotted on it.

Dr. Spiinks: No alimony should be allotted. Suppose the husband could raise money upon the legacy, its present value would not, if invested at 5 per cent., bring in more than about £20 a year, and there would be difficulty in his raising money on it.

THE JUDGE ORDINARY: *De minimis non curat lex*. I think that I ought not to allot alimony upon the legacy.

1862.
November 4.
HARE
v.
HARE.

HARE v. HARE.

Practice.—Omission of Petitioner to set down Cause for Trial.—Respondent setting it down.—Settling Record.—Rules 22, 24.

Where five months had elapsed since the Court had directed that a cause should be tried without a jury, and the petitioner had not set down the cause for trial, the Court, on the application of the respondent, gave him leave to set it down for trial if the petitioner should not do so within a fortnight.

The respondent in a suit by a wife for dissolution of marriage, moved the Court to order that the petitioner should set down the cause for trial. The answer was filed in March, 1862, and a replication in April. Alimony *pendente lite* has been allotted at the rate of £70 per annum. On the 27th of

May, the Court directed that the cause should be tried without a jury, but since that time no step has been taken by the petitioner.

1862.
November 4.

HARE
v.
HARR.

Dr. Spinks, for the petitioner: It is the respondent's own laches that the cause has not been set down. He might have set it down himself under Rule 24: "The petitioner shall file the record and set down the cause as ready for trial, and on the day upon which it is set down, shall give notice of his or her having done so to each party for whom an appearance has been entered; and if the petitioner delay filing the record and setting down the cause as ready for trial for the space of one month from the day on which the record was finally settled, the respondent may file the record and set the cause down as ready for trial, and give a similar notice, etc."

The respondent (in person): Under that rule the respondent can only set down the cause as ready for trial after the record has been settled for the jury.¹

THE JUDGE ORDINARY: The practice in the registry has not been to construe that rule as applicable only to cases in which the record has been "settled." If the petitioner does not within a fortnight set down the cause for trial, the respondent may do so.

STUART v. STUART.

December 16.

Delay in Prosecuting Petition.—Course open to Respondent.

If the petitioner delay filing the record and setting down the cause as

STUART
v.
STUART.

¹ By Rule 22, whenever a case is to be tried before a jury, the Judge Ordinary shall direct the questions at issue to be stated in the form of a record to be settled by one of the registrars.

1862.
December 16.
—
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STUART.

ready for trial for the space of one month from the final settling of the record, the respondent may file the record and set the cause down as ready for trial (Rule 24) ; or the respondent may take a rule to show cause why the petition should not be dismissed.

On the 12th of December, 1861, the wife filed a petition for a judicial separation, on the ground of the alleged cruelty of her husband. The respondent filed an answer on the 24th of July, 1862, denying the adultery; and on the 2nd of December, 1862, the Court, on his motion (the petitioner having failed to take further steps in the suit), directed the cause to be tried before the Court by a common jury.

On the 1st of December, 1862, the respondent's solicitor received a note from the petitioner's solicitor, informing him that the petitioner did not intend to proceed further in the cause.

A copy of this note annexed to an affidavit was before the Court.

The Queen's Advocate (Sir R. Phillimore), for the respondent, moved the Court to dismiss the petition.

THE JUDGE ORDINARY : You are not in a position now to ask me to dismiss the petition. The note received from the petitioner's solicitor is not a sufficient authority for the Court to act upon. The respondent has two courses open to him. He may, under 24th rule, if the petitioner fails to file the record and set the cause down for trial within one month from the day on which the record is settled, file the record, and set down the cause for trial himself; and then when the cause comes on for hearing, if the petitioner were not to appear, the respondent would be in a position to ask the Court to find the issues raised in his favour, and to dismiss the petition. Or you may, if you prefer it, take a rule *Nisi* for the petitioner to show cause why the petition should not be dismissed, and if she does not appear and show cause, then I will dismiss

it; but if she were to object to its being dismissed, I could not do so.

1862.

December 16.

STUART

v.

STUART.

DAVIES v. DAVIES AND HUGHES.

1863.

January 28 and
February 10.

Dissolution.—Separation previous to the Adultery charged.
—Discretion of the Court.—Sect. 31 of the Divorce Act,
1857.

DAVIES

v.

DAVIES AND
HUGHES.

A husband and wife were in domestic service in the same family at the time of their marriage. Shortly after the marriage the husband went into service elsewhere, leaving the wife in the same service, where the wife soon contracted an adulterous connection with another manservant.

The Court held that he had not been guilty of desertion or of wilful separation without reasonable excuse, and that he was entitled to a dissolution of his marriage by reason of her adultery committed subsequent to the separation.

Dr. Spinks conducted the petitioner's case.

The facts were shortly these:—Petition by a husband for a dissolution; no appearance. Marriage at Wolverhampton in 1842, when the petitioner was a valet and the respondent was a cook, both in the service of the same family in the neighbourhood of that town. A few years after the marriage the husband left the service and entered alone the service of a family, with whom he had remained ever since. The co-respondent was a footman in the family where the respondent lived.

THE JUDGE ORDINARY: The case requires a great deal of consideration. A man in service marries twenty years ago, and of his own accord leaves the service, in order, as he says, to better his situation; and there is not the slightest evidence

1863. that, from that hour, he ever communicated with his wife, or
January 28 and attempted to go and see her.
February 10.

Cur. adv. vult.

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DAVIES AND
HUGHES.
February 10.

THE JUDGE ORDINARY: This was a suit for dissolution by a husband in consequence of the adultery of the wife. The parties were married many years ago, being then both in the same service. Not very long after the marriage the husband left the service and got a place in London, where he has been living ever since. One person who was examined said he knew nothing of the reason of his going, and another said he had left in order to better himself. Upon the hearing, I thought it deserved great consideration whether it was a case in which I was bound to act in the exercise of the discretion given to me by the 31st section of the Divorce Act, and to withhold a divorce, on the ground that the husband had wilfully separated himself from her. It appeared that very soon after the petitioner's successor came into the service where the wife was left, she began to show partiality for him, and to allow him to take considerable liberties with her. There was nothing to show that at that time the absence of the husband was unreasonable, or that the wife objected to it. After she had formed the intimacy with the co-respondent she lived in open and notorious adultery with him, and bore him several children. One circumstance that had an effect upon my mind at the hearing was, that there was no proof that the petitioner had gone into the country to see her after his removal to London; but, for aught I know, that may be accounted for by her course of life having been brought to his knowledge. The adultery having been proved, and none of the circumstances established which give the Court power to withhold a decree, I am bound to pronounce a decree *Nisi*, with costs against the co-respondent.

(*Before the Full Court.*—THE JUDGE ORDINARY, WILLIAMS, J., and
CHANNELL, B.)

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CHICHESTER v. MURE (falsely called Chichester).

CHICHESTER
v.

*Dissolution of Marriage.—Second Marriage of one of the
Parties.*—20 & 21 Vict. c. 85, s. 57.

MURE
(falsely called
Chichester).

Where, after a decree of dissolution of marriage, one of the parties to such marriage was married in fact within the time limited by 20 & 21 Vict. c. 85, s. 57, and during the lifetime of the other party to the marriage, the Court held the latter *de facto* marriage to be null and void in law.

This was a suit for a declaration of nullity of marriage under the circumstances in the following petition stated, which was demurred to, and joinder in demurrer:—

“The petition of George Augustus Hamilton Chichester,
“of 39, Wigmore Street, in the county of Middlesex,

“Showeth, that on the 9th day of August, 1859, your
“petitioner was married in fact to Lucy Virginia Elizabeth
“Mure, then lately the wife of William Mure, Esq., Her
“Majesty’s Consul at New Orleans, under her maiden name
“of Lucy Virginia Elizabeth Oliver, and now falsely calling
“herself Lucy Virginia Elizabeth Chichester, at the British
“Consulate Office at Paris, in the Empire of France.

“That upon the said 9th day of August, 1859, the said
“Lucy Virginia Elizabeth Mure was by law incapable of
“entering into the contract of marriage, by reason that she
“had been lawfully married to the said William Mure, Esq.;
“that the said William Mure, Esq., was still living; that
“although Her Majesty’s Court for Divorce had, on the
“petition of the said William Mure, Esq., pronounced its
“decree dissolving the marriage between the said William
“Mure, Esq., and the said Lucy Virginia Mure, such decree
“was made and pronounced upon the 1st day of July of
“the said year 1859, and not before; that no appeal had

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“been presented against the said decree; that the statute 20
 “& 21 Vict. c. 85, by virtue whereof such decree was made,
 “provides that an appeal from any such decree may be pre-
 “sented to the House of Lords within three months after
 “the pronouncing thereof; and further provides that, when the
 “time thereby limited for appealing against any such decree
 “dissolving a marriage shall have expired, but not sooner, it
 “shall be lawful for the respective parties thereto to marry
 “again, as if the prior marriage had been dissolved by death,
 “and that consequently the time limited for appealing against
 “the said decree dissolving the said marriage, pronounced
 “upon the said 1st day of July, 1859, had not expired upon
 “the said 9th day of August, 1859.

“That by reason of the premises, the said marriage so con-
 “tracted in fact between your petitioner and the said Lucy
 “Virginia Elizabeth Mure, was in law null and void to all
 “intents and purposes whatsoever.

“Wherefore your petitioner humbly prays that your Lord-
 “ships will be pleased to decree that the marriage in fact but
 “illegally celebrated between your petitioner and the said
 “Lucy Virginia Elizabeth Mure, was and is null and void,
 “and that your petitioner is free from all bond of marriage
 “with the said Lucy Virginia Elizabeth Mure, and that your
 “petitioner may have such further and other relief in the
 “premises as to your Lordships may seem meet. And your
 “petitioner will ever pray, etc.

“GEORGE A. H. CHICHESTER.”

Demurrer.

The respondent, Lucy Virginia Elizabeth Chichester, by
 George Francis Cooke her attorney, saith, that the petition is
 bad in substance on the grounds that on the 1st of July,
 1859, the marriage between the respondent, Lucy Virginia
 Elizabeth Chichester and William Mure, was dissolved by de-
 cree of this Court, and from the date of such decree she, the
 respondent, became and was a *feme sole* for all purposes, and

more particularly she was capable of contracting marriage. That the statute 20 & 21 Vict. c. 85, does not declare null and void the marriage of one whose previous marriage had been dissolved by decree of this Court, and who has entered into a new contract of marriage before the time limited in the said statute for appealing against the decree dissolving the previous marriage has expired, or before such appeal, if any, has been dismissed, or before it has been determined by a decree confirming such dissolution.

The 24th of December, 1862. Joinder in demurrer.

The petitioner, by John Vallance his attorney, says the petition presented by him is good in substance, and therefore he humbly prays as before.

The decree dissolving the original marriage was in the following terms:—

“ 1859, 30th June.—The Judges having taken the oral evidence of the witnesses produced on behalf of the petitioner, and heard Counsel thereon, by their final decree pronounced and declared the marriage had and solemnized on the 10th day of November, 1856, at Dumfries, in North Britain, between William Mure, the petitioner in this cause, and Lucy Virginia Mure, then Lucy Virginia Oliver, the respondent in this cause, to be dissolved, by reason that since the celebration thereof the said Lucy Virginia Mure, the respondent, had committed adultery with Geo. Aug. Hamilton Chichester, the co-respondent in this cause, and condemned the said co-respondent in costs.”

The Queen's Advocate (Sir R. Phillimore), *Dr. Middleton* with him, now argued in support of the demurrer.—This is a case *primæ impressionis*. By the 56th section of the Divorce Act, either party dissatisfied with the decision of the full Court on any petition for the dissolution of a marriage, may within three months after the pronouncing thereof appeal therefrom to the House of Lords, if Parliament be then

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sitting, or if Parliament be not sitting at the end of such three months, then within fourteen days next after its meeting. By sect. 57, when the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such a decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but no sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death. The question is, whether the words of the statute make such a marriage had before the time limited, null and void. We submit, first, that in construing a statute relating to marriage, the same words may bear a different construction from what they would bear applied to any other contract. Secondly, that prohibitory words are not equivalent to nullifying words. Thirdly, that no nullifying words are to be found in the statute. Fourthly, that if the Court has any doubt, it will incline in favour of the marriage. Fifthly, that at common law the effect of an appeal on the sentence of an inferior court is nothing as regards the course of proceeding in that inferior court. In the Ecclesiastical Court the mere averment of an appeal does not stay the Court below, but the service of an inhibition from the Court above has that effect. We rely upon the reasoning of Dr. Lushington in *Catterall v. Sweetman* (falsely calling herself Catterall), 1 Rob. 304; the marginal note is: "A marriage purporting to have been had under an authority of the Colonial Act of New South Wales, passed on the 4th of July, 1834, held not to be invalid, by reason of a non-compliance with its provisions, there being no words therein expressly creating a nullity. Query, unless there be in a marriage Act *such* words, whether any other words could be held to import a nullity." As to the parties in this particular case, Mr. Mure, the plaintiff in the original suit, would never have appealed from the decree in his favour. The other

parties, the respondent and co-respondent, by their inter-marriage, must have renounced their right. As matters then stood, before the Queen's Proctor's Act, who could have interfered with sentence of dissolution? It is sufficient to satisfy the words of the Act that the appeal should have determined howsoever.

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Dr. Spinks (with whom was *Mr. Hume Williams*) in support of the petition: We agree that it is a case *primæ impressionis*, but deny that it is decided by *Catterall v. Sweetman*. The statutes commented upon in that case referred to forms and ceremonies of marriage, without which, before the statutes, marriages would have been valid; and it was necessary to show that by those statutes, which introduced such forms and ceremonies, the marriages were made invalid. Here the *status* of the person, her capacity to contract a marriage during the life of the man whose lawful wife she once was, depends entirely on the Divorce Act. The benefit or freedom conferred by that Act must be taken with the limitations which the Act imposes. The Act says certain persons may marry, who, under the old state of the law, were incapable of entering into that contract, but not before a certain time. A construction should be put on the statute on general principles—is such a person free, or not free, to marry before the time limited?—and not on any consideration of the probability or possibility of an appeal having been in fact made in this particular case.

THE JUDGE ORDINARY: The Court does not affect to feel any great difficulty in this matter, but as the point to be determined is one of great practical importance, it thinks it better that its opinion should be given in writing.

Cur. adv. vult.

THE JUDGE ORDINARY delivered the following judgment of the Court:—This case came on for hearing on a demurrer by

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the respondent to a petition by George Augustus Hamilton Chichester, whereby he prayed that a marriage in fact had been between himself and the respondent, in the petition called Lucy Virginia Mure, but which marriage the petitioner alleged had been illegally contracted, might be declared null and void. The facts, as they appear in the petition, and admitted by the demurrer, are, that on the 9th of August, 1859, the petitioner and the respondent were married in fact at the British Consulate Office at Paris, in the empire of France; that the said respondent had been, before the said 9th of August, lawfully married to William Mure, Esq., who at the time of the marriage between the petitioner and the respondent was still living; that on the 1st of July, 1859, a decree was made and pronounced by this Court on the petition of the said William Mure, dissolving the marriage between the said William Mure and the respondent, and that no appeal had been presented against such decree.

The question that arises is, whether the marriage in fact had and celebrated between the petitioner and the respondent on the 9th of August, 1859, within three months after the decree dissolving the respondent's marriage with Mr. Mure, there having been no appeal against such decree, was a valid marriage? The answer to this question depends on the construction to be placed on the statute 20 & 21 Vict. c. 85, s. 57.

The case was argued in January last by the Queen's Advocate and Dr. Middleton for the respondent in support of the demurrer, and by Dr. Spinks and Mr. Hume Williams for the petitioner. The question being new, and one of great and general importance, the Court took time to consider its decision. On behalf of the respondent it was not disputed that the marriage now appealed against, if valid, must owe its validity to the statute 20 & 21 Vict. c. 85. Nor was it, nor could it be denied, that the contract was in opposition and disobedience to express words contained in the 57th section of

that statute. But it was contended for the respondent that the statute contained no words nullifying,—that is, expressly declaring a marriage contracted and celebrated within the prohibited time null and void; and that, in construing a statute which relates to a contract of marriage, a different rule of construction ought to prevail from that which might properly enough be applied to statutes relating to a subject-matter other than a contract of marriage; and that, in construing a statute relating to a contract of marriage, it is not enough to invalidate the marriage to show a disregard of enactments merely negative and prohibitory, but the marriage must be held good, unless there are words expressly declaring that it shall be null and void. The case of *Catterall v. Sweetman* (*falsely calling herself Catterall*), decided by Dr. Lushington, in the Consistory Court of London, in the year 1845, reported in 1 Rob. Eccl. Rep. 304, was mainly relied upon in support of the construction contended for by the respondent. That case was urged upon us as an authority that ought to govern the decision of this Court upon the precise question before us.

But the case of *Catterall v. Sweetman* (*falsely calling herself Catterall*) is very different from the present. The marriage in that case was solemnized in New South Wales after the passing of an Act of the Governor and Legislative Council, on the 4th of July, 1834, and which was “An Act to remove doubts as to the validity of certain marriages, and to declare the law respecting *such* marriages for the future;” and then came a declaratory and enacting clause, “that marriages solemnized in a certain manner before the Act shall be valid.” Dr. Lushington held that the word “*such*” referred to *past* marriages. The second section related to future marriages, and enacted that marriages solemnized in the manner mentioned should have the same force as if solemnized before a clergyman of the Church of England; with this proviso: “Provided always, that from and after the passing of this

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"Act, no such marriage as last aforesaid shall be had and solemnized, until both or one of such persons, as the case may be, shall have signed a declaration in writing in duplicate, stating that they, or he, or she, as the case may be, are or is members or a member of, or hold communion with, the Presbyterian Church of Scotland, or the Roman Catholic Church respectively, according to the form hereunto annexed." There were no words declaring such marriage void, if the proviso were not complied with. Dr. Lushington came to the conclusion that such a marriage, if good before the Act passed, would not be rendered void by the statute, but if not good before, would not be aided by it; that the object of the statute was not to make any marriage void that would have been valid without its aid, and the proviso only had the effect of preventing parties from deriving any benefit from the Act unless they complied with its requisitions. The libel was framed on the supposition that the statute rendered the marriage void; that libel he rejected, leaving it open to the parties to assail the marriage, on the ground that it was void by law independently of the statute.

If the case of *Catterall v. Catterall* is to be taken only to have decided that where parties not incapable of contracting marriage who are under no disability at all, but who, professing to contract and solemnize the marriage in some new manner or form provided by statute not open to them before, and who, in making the contract, and with reference to the solemnization thereof, disregard some prohibitory enactments in such statute, that then the marriage is not thereby made void unless there are words nullifying the marriage, we see no reason to question the correctness of the decision. It is, however, quite a different question, whether, in construing a statute which gives the very right to contract at all, we are then to hold that the marriage is good, notwithstanding a disregard of words negative and prohibitory, which relate to the very capacity to contract, because there are no words expressly nul-

lifying the contract. The Ecclesiastical Court had no power to dissolve a marriage which was a valid marriage at the time when it was contracted, so as to give the parties a right to marry again. Such a dissolution could be effected, and the right of either of the parties to marry again during the lifetime of the other could be obtained, only by Act of Parliament.

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By 20 & 21 Vict. c. 85, power is given to this Court in certain cases to dissolve a valid marriage, and by the 57th section a capacity or right is given to a party divorced to marry again during the lifetime of the other. This right is not general, but limited to certain cases. First, when the time limited for appealing to the House of Lords against the decree of this Court shall have expired (as to which see sections 55 and 56), and no appeal shall have been presented. Secondly, when any such appeal shall have been dismissed. Thirdly, when in the result of the appeal the marriage shall be declared to be dissolved, then, *but not sooner*, the parties divorced may marry again, as if the prior marriage had been dissolved by death. In this case the time for appealing to the House of Lords had not expired when the marriage in question took place.

The form invariably adopted by the Legislature in divorce Bills implies a doubt whether the dissolution of a marriage by Act of Parliament was of itself sufficient to enable the parties to marry again. The form is found in Macqueen's Practice of the House of Lords, 507. The first clause enacted that "the bond of matrimony being violated and broken by, etc., "is hereby from henceforth dissolved, annulled, vacated, and "made void to all intents, constructions, and purposes what-ever." The second clause enacted "that it shall be lawful "for the complainant, at any time after the passing of the "Bill, to marry again as freely in all respects as if the party "convicted of adultery were actually dead."

The introduction of such a clause into divorce Bills probably caused the Legislature to make express provision as to the

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consequences of a decree of dissolution of marriage pronounced by the Court about to be created. If no express power to marry again had been given, it might have been argued, from the practice in divorce Bills, that no such power was conferred by the decree of the Court; and certainly, if no such power had been expressly given, and it had been enacted that it should not be lawful for the parties to marry again until a certain time had elapsed after the making of the decree, a marriage solemnized before that time would have been void, for the parties would have been thereby rendered incompetent to contract. Thus, if by the 57th section it had been enacted "that it shall not be lawful for the respective parties to a marriage dissolved by a decree of this Court to marry again before the expiration of a certain time," no doubt could have existed as to the prohibitory effect of those words; it seems to us their meaning and effect must be held to be the same, although they are preceded by words making it lawful to marry after the expiration of that time.

We have considered the case principally with reference to the proper construction to be placed on the statute, and the weight to be given to *Catterall v. Sweetman*, as an authority for the construction contended for by the respondent. Some other cases were cited, and a reference was made to text-books, particularly to Bishop's 'Treatise on Marriage and Divorce.' We think it unnecessary to notice all these authorities. One of the cases cited was that of *Stallwood v. Tredger*, decided by Sir John Nicholl, whose decision was in the result supported by the Court of Delegates, and is reported in 2 Phill. Rep. 287, and commented upon at some length by Dr. Lushington in *Catterall v. Sweetman*. On what ground the Court of Delegates supported the decision of Sir John Nicholl is not stated, but Sir John Nicholl himself pronounced for the validity of the marriage on the ground that the publication of the banns, though in fact such publication took place in the parish of St. George's, Southwark, must, under the

particular circumstances, be considered legally as having taken place in the parish church of St. Mary, Newington, in which parish the marriage was solemnized. Assuming that to have been the ground of the decision, the case affords little, if any, assistance in determining the present. The case of *Rex v. The Inhabitants of Birmingham*, 8 B. & C., was a decision upon a marriage contract. In that case it was held that the want of the consent of the father of the husband, who was a minor, which consent was required by the statute 4 Geo. IV. c. 76, in case of the marriage of a minor by licence, did not render the marriage void. There was there no previous impediment creating an incapacity to contract at all. There were no nullifying words in sect. 16 of the 4 Geo. IV. c. 75, applicable to the question then under consideration; there were not even prohibitory words. The case depended on the 16th section (construed with reference to other sections in the statute), and the 16th section merely required a consent, and that requirement was held to be directory only.

It was further argued before us that this particular case ought to be determined as if the time for appeal had run out; that the time allowed by the 56th section was allowed for the protection of a party dissatisfied with the decree of this Court dissolving the marriage; that Mr. Mure, the petitioner in the former proceedings, having obtained a decree in his favour, he could not appeal; and the only other party, viz. the now respondent, for whose protection the right to appeal was given by the statute, might renounce a right which under the circumstances of the case continued to exist for her advantage only. We think that we ought not to decide the question on any such view, and that we are called upon to determine the broad and general question whether a second marriage, within three months of the decree dissolving the first marriage, by one of the parties to that first marriage during the lifetime of the other, or before the happening of the other events mentioned in the 57th section, is a good marriage.

1863.

Jan. 22 and
June 8.

CHICHESTER

v.
MURE
(falsely called
Chichester).

1863. After a full consideration of the case and the arguments submitted to us, we feel bound to say that we think the marriage in question was prohibited by the statute 20 & 21 Vict. c. 85, sect. 57, and we therefore decree that such marriage was null and void. It is a satisfaction, however, to know that all difficulty in the way of an appeal from our decision is now removed by the 21 and 22 Vict. c. 108, s. 17.

Jan. 22 and
June 8.
—
CHICHESTER
v.
MURF
(falsely called
Chichester).

1862.

N— v. N—.

June 12 & 13,
and July 15.
N—
v.
N—.

Judicial Separation.—Cruelty.—Charges of Unnatural Connection and of Infection.

Weight given by the Court to the wife's evidence of unnatural connection had, or attempted to be had, with her by the husband, and to evidence tending to prove the existence of gonorrhoea, and of its wilful communication by husband to wife.

This was the wife's petition for judicial separation.

The petition alleged:—1. Marriage on the 14th day of July, 1860. 2. That after said marriage your petitioner lived and cohabited with her said husband at Sunbury, in the county of Middlesex, the residence of her parents, and that the said petitioner and her said husband have had issue of their said marriage one daughter, born on the 15th of March, 1861, and that the said petitioner is now again pregnant by her said husband (it was stated in evidence that the second child was born on the 4th of April, 1862). 3. That on divers occasions since their marriage the said G. G. N. has in divers ways, at their said residence, treated your petitioner with cruelty, as hereinafter set forth. 4. That the said G. G. N. frequently swore at and abused your petitioner in foul and offensive lan-

guage, and on several occasions, the dates whereof your petitioner is unable to set forth, threatened to take your petitioner's life. 5. That on an occasion happening about the month of February, 1861, the said G. G. N. threw your petitioner down violently on the bed, and, in order to terrify your petitioner, seized a razor and drew it across her throat, as if to cut it. 6. That the said G. G. N. constantly kept loaded pistols in his bedroom, and that on an occasion happening about the month of September, 1861, he presented a loaded pistol at your petitioner, and said, "By God I'll shoot you." 7. That about a month before the birth of your petitioner's said child, the said G. G. N. kicked your petitioner out of bed, and about a week before the said birth violently assaulted your petitioner and threw her down. 8. That on another occasion, happening about the month of July, 1861, the said G. G. N. violently assaulted and struck your petitioner in the breast. 9. That on two several occasions, happening about the months of May and June, 1861, the said G. G. N., in spite of your petitioner's remonstrances, attempted to have sodomitical intercourse with your petitioner, and thereby seriously hurt her. 10. That some time in or before the month of August, 1861, the said G. G. N., knowing himself to be infected with the venereal disease, communicated the same to your petitioner.

The respondent's answer denied the alleged acts of cruelty and alleged condonation, on which issue was joined and taken.

The case was tried by the Court itself.

Dr. Phillimore, Q.C., and *Dr. Spinks*, for the petitioner.

Mr. Macaulay, Q.C., and *Mr. R. Pritchard*, for the respondent.

As to the 9th paragraph, the petitioner stated in evidence to the following effect:—"In May and June, 1861, I was co-

1862.

June 12 & 13,
and July 15.

N—

v.

N—.

1862. "habiting with my husband; there was something peculiar
 June 12 & 13, "about my husband's intercourse at that time; towards the
 and July 15. "beginning or end of May he had improper intercourse with
 N— "me. I remonstrated and entreated him to desist; he said
 v. "it was usual between man and wife. On three occasions he
 N—. "made the attempt; the second time he did desist through
 "my expostulations, because I was suffering so much from
 "the first occasion; on the third occasion I had to use all my
 "strength to prevent him." On cross-examination as to
 whether she and her husband had not been in the habit of
 trying strength against each other, she said, "On one occasion
 "we did try strength, and I was the strongest then."

The respondent denied on oath that he had done or attempted to do any such thing.

The substance of the evidence on the 10th paragraph is sufficiently given in the following judgment, which is reported principally for the remarks therein on the subject-matter of these two paragraphs.

Cur. adv. vult.

July 15. **THE JUDGE ORDINARY:** This is a suit for a judicial separation. The petition and evidence raised some questions of a very disagreeable nature, and I could have well wished to be relieved from the necessity of discussing them. Many people are of opinion that the publication of matters disclosed in this Court cannot but be prejudicial to society. In some cases that is probably true; but, on the other hand, I am satisfied that a calm consideration of the state of feeling that results from matrimonial quarrels, and of the utter disregard of public opinion, and of the shame and disgrace which must attach to them, often manifested by both parties, must produce a beneficial influence upon all who are not blinded by their vindictive feelings.

In this case the wife seeks for a judicial separation, and it appears, by the evidence of Mr. Parker (of whose veracity there can be no doubt), that the same object which would be

obtained by such decree might, and probably would, have been accomplished by private arrangement, but for some dispute about pecuniary matters, over which the Court has no control. The case having come before the Court, the petitioner must have known that she was liable to be asked questions respecting ante-nuptial conduct, which must for ever hereafter deeply affect the social position of herself and her mother. On the other hand, the respondent, for no intelligible purpose, save that of injuring his mother-in-law (for he expressly stated that he had no complaint whatever against his wife), caused a public disclosure to be made of his wife's ante-nuptial frailty, and imputed to her mother connivance at her daughter's dishonour—an ungenerous course, which, I should imagine, would impress upon himself a stain at least as deep as that by which he sought to degrade them.

The marriage was solemnized in July, 1860; the final separation took place in September, 1861. In the interval several acts were done by him which the Court might have thought sufficient to establish a charge of cruelty, but the parties continued to cohabit as man and wife, and therefore all such acts down to September last were condoned, and the case turned upon a revival by some subsequent act. In that month, as was deposed by the wife, he took up a pistol and threatened to shoot her; she looked firmly in his face, and he then lowered his hand and did not fire, and that she was so much alarmed that she resolved to leave him. The respondent did not deny the act, but alleged that it was not done in anger, but that both had been in the habit of firing his pistols, that on the occasion in question they had been romping together (which did not appear to have been unusual with them), and that the threat was uttered in jest. The wife, on cross-examination, stated that she never told any one of his threat, but that her alarm and other things caused her to refuse to live with him again as his wife; but when pressed she would not swear positively that she had not afterwards slept with him, or that

1862.
June 12 & 13
and July 15.

—
N—
v.
N—.

1862. she had on the same day, after the alleged threat, gone
 June 12 & 13, out for a drive with him. A week after, Mr. Parker, the
 and July 15. respondent's solicitor, was sent for, and during an inter-

N—
 v.
 N—.

view of several hours the subject of a separation was discussed; many charges were made against the respondent by the petitioner and her mother, but it did not appear that the pistol was mentioned, and I am not satisfied that any threat was uttered by the husband in such manner as to show that future cohabitation would be unsafe, nor in such a manner as to cause in the wife a reasonable apprehension of violence; I cannot, therefore, come to the conclusion that the former acts of which he was accused were thereby revived.

But there were two other charges of such a nature that it is necessary to take special notice of them. The first is, that in the month of May, 1861, the respondent committed an unnatural crime on her person; that she did not complain of it, labouring under the erroneous belief that he had a right so to treat her if he pleased. Now it is remarkable that the petition charged an attempt to commit, and not the commission of such a crime; the respondent denied the act and the attempt to commit it. There was not on either side any corroborative evidence, nor could it well be expected that any could be adduced. In all cases where a crime is imputed, the presumption of innocence must prevail until guilt has been proved; and in proportion to the gravity of the charge and the rare occurrence of the crime imputed, it is reasonable to require more cogent evidence to overthrow the legal presumption of innocence. The crime here imputed is so heinous and so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath, without any further evidence, direct or circumstantial, to support the charge. I cannot therefore come to the conclusion that this charge was proved.

Another charge was that the respondent had communicated

to the petitioner a loathsome disease. A medical man, who was consulted about a week after the separation, deposed that he then examined the petitioner, and found her labouring under gonorrhœa in a violent form, and that she must have had it some time; that she was suffering much pain, and that such pain was generally experienced in ten or twelve days after the disease showed itself. The petitioner, when examined as a witness, deposed that she never had sexual intercourse with any one but her husband; she did not state when she first had any of the symptoms observed by the medical men, nor was the existence of such symptoms assigned as a reason for refusing further cohabitation with her husband. The only corroborative evidence given by the petitioner was, that she had seen him use a syringe with powdered alum and water or water alone. The laundress employed to wash for the family deposed that in May or the beginning of June she observed marks on the linen of the respondent, which might be supposed to indicate that he was suffering from gonorrhœa in a virulent stage, and that she soon afterwards noticed similar marks on the linen of the petitioner. Now they did not separate until September, nor was any assertion made that connubial intercourse did not continually take place between them until that time, which is utterly inconsistent with the supposition that both were during that period, viz. from June to September, affected by disease. The respondent was never subjected to medical examination, and he positively denied the existence of such disease. It was not made the subject of complaint during the long interview with Mr. Parker, and when Mr. Kingsford attended her before the separation nothing was said that intimated to him the existence of any such cause for her illness. Upon this evidence I cannot feel satisfied that the disease ever existed, and therefore I cannot find the respondent guilty of this act of cruelty. If I had been of opinion that she suffered from real and not simulated gonorrhœa, two questions would remain—first, whether it was wilfully communicated, as to

1862.

June 12 & 13,
and July 15.

N—

v.

N—.

1862. which the Court has nothing to guide it but mere conjecture ;
 June 12 & 13, and secondly, had it been condoned ?
 and July 15.

N—
 v.
 N—.

If I were to assume it to be proved by the evidence of the laundress that both had the disease in June, the wife to be sufficiently awake to the subject to notice the use of the syringe, I must also assume that she knew the nature of the disorder, and then I must hold that it was condoned by subsequent cohabitation.

In the result, I have arrived at the conclusion that there has been no uncondoned act of cruelty upon which a decree of judicial separation can be founded. There appears to have been much in the conduct of both parties upon which they may well reflect with deep regret. As far as this Court is concerned, they must continue to reside together. They are both young, and if they sincerely desire to control their tempers and amend their habits, many years of happiness may still be in store for them ; that depends upon themselves : from this Court they are dismissed.

1863.
 June 15 and 16.

S—
 (falsely called
 E—)
 v.
 E—.

S— (falsely called E—) v. E—.

Petition for Nullity.—Impotence.—Medical Report and Evidence.—Curability.

S., a woman, married E. on 22nd of July, and lived with him till 23rd of September. She petitioned for a decree of nullity by reason of his inability to consummate the marriage. He did not appear. The report of medical inspectors negatived any apparent and incurable defect on his part, but ascribed the non-consummation to incapacity caused by a long-continued habit of self-abuse, which (as further explained by their *vivâ voce* evidence) they considered might possibly, but not probably, be cured ; the question being one of moral restraint. There was no report of inspectors as to the condition of the

woman, and their *visd voce* evidence was equivocal as to proof of non-consummation from examination of her person. The Court refused to make the decree: 1863. June 15 and 16.

SEMPLE, the Court would not, at all events, make such a decree without a report from sworn medical inspectors as to the condition of the woman.

S—
(falsely called
E—)
v.
E—.

This was the petition of the woman for a decree of nullity of marriage by reason of the impotency of the man. The substance of the petition is sufficiently stated in the judgment.

Dr. Wambey conducted the petitioner's case.

The report of the sworn medical inspector as to the respondent's condition was as follows:—

“26th January, 1863.

“We, the undersigned medical inspectors appointed to examine and report upon the condition of the generative organs of Henry E—, do hereby declare that we have made a careful examination, and find that the external organs, viz. the penis and the two testicles, of the said Henry E—, are perfectly natural and well formed, and, as far as we are able to judge, fully competent to perform their functions. However, it appears that Henry E—, who is twenty-nine years of age, has been the subject of fits since he was five years old, and that he has practised excessive self-abuse, masturbation, and has continued to do so since his marriage in 1861. Considering the foregoing facts, we cannot but believe that there is a want of proper virile power. The long continuance of the fits has no doubt induced great deficiency in the nervous system, but there is not a sufficient cause of impotence, as there are many epileptic persons who have married and had children; the more probable cause is one of a mental or moral character, viz. self-abuse; this we know, if carried to any great extent, induces an aversion to the female sex. This cause is

1863. "remediable, and remains entirely at the option of the per-
 June 15 and 16. "son concerned. Self-control may restore the natural feel-
 — S— "ing towards the wife; but the continuance of self-abuse will
 (falsely called E—) "leave matters as they are.
 v.
 E—.

"ALFRED POLAND.

"SAMUEL BAYFIELD."

The learned Judge pointed out that there was no report of medical inspectors as to the condition of the petitioner.¹

Evidence of the marriage on 2nd of July, 1861, was given, and the petitioner deposed to the following effect:—

I am twenty-seven years old; first became acquainted with E— in the year 1860; became engaged to be married to him in about eight months; had no talk with him about his epileptic fits before marriage. On the marriage we went to my mother's house at Marlborough, in Wiltshire. I thought him strange the whole of that day; he was ill in the evening, had a fit; we did not sleep together that night. The next night we slept together; he went to sleep, made no attempt to have intercourse. We continued to sleep together till 22nd or 23rd of September. On 2nd of August he attempted intercourse, but did not penetrate me; he made one other attempt without having intercourse; he said nothing. On the other nights he only went to sleep with his back towards me. I left him some time in September. I never resisted my husband's attempts to have intercourse, I was willing that he should. I was ill in September; my aunt fetched me away. I began to recover soon after I left. I have not lived with him since.

Mr. Bayfield, one of the inspectors, deposed:—I am a surgeon practising in Southwark. I have directed my attention to diseases of the generative organs. On the 20th of January,

* See *H. (falsely called C.) v. H.*, 1 Swab. & Trist.; and *Serrell v. Serrell and Bamford*, 2 Swab. & Trist.

I, with Mr. Poland, examined the respondent, when we found no malformation. I asked him the reason he did not perform the functions of a married man; he hesitated in answering; and on my repeating the question, he said he did not much care, he did not know why. I asked whether any better reason, or any cause. On his declining to answer, I at once said, "You are addicted to an unnatural practice;" he said, "Yes." I asked how long. He said from a very early age. I asked how frequently. He admitted most days; sometimes two or three times a day, sometimes oftener; in one twenty-four hours, five times. I asked why was nothing done on wedding-night? He said because he had a fit. Upon asking why he afterwards made no attempt, he said he did not feel to care about it. From my medical experience I can say that the habit of self-abuse would have a tendency to cause incapacity for sexual intercourse. From what he said I imagine the fact of non-consummation in the present case arises from his habit; in such cases there may be emission without power of sexual intercourse. Such a habit is most difficult to break, but not incurable in a moral sense. I never knew in fact a case to the present extent and of so many years' continuance cured. It depends on the respondent himself. I know the petitioner. I have examined her; there is no malformation, and, as far as I could judge, she is a virgin; but it is a difficult question: I believe she is. In some cases you cannot be mistaken, in others you may.

The same witness, in answer to questions put by the Court:—I did examine petitioner sufficiently to say that there was a partial absence of the usual indicia of virginity. As to the habit of self-abuse, I should say that the presence of a woman in bed night after night is not likely to cure the habit. I should think with his best efforts it is possible, but not probable, that a year or two might produce a cure.

Alfred Poland deposed:—I am a Fellow of the College of Surgeons, and one of the surgeons of Guy's Hospital. On

1863.

June 15 and 16.

S—
(falsely called
E—)
v.
E—.

1863. the 20th of January I was at Mr. Bayfield's house, and there
 June 15 and 16. examined the respondent. Mr. Bayfield's account of the in-
 S—
 (falsely called interview is correct. He was the mouthpiece on the occasion.
 E—)
 v. Respondent said he had had epileptic fits from a child. I
 E— considered the fits to be congenital, but kept up afterwards
 by his habit of self-abuse. When the habit is contracted to
 such an extent, there is a bare possibility, not probability, of
 its being cured. Impotence would result from a long-con-
 tinued habit of the kind. It is prejudicial to a woman's
 health to sleep with a man without consummation. I ex-
 amined the petitioner, but cannot speak as to her condition.
 The question as to consummation is a difficult one to answer,
 and in this case I cannot answer it.

Mr. Badger, surgeon, of Gutter Lane, Cheapside, said:—
 In September, 1861, I was called in to attend the petitioner.
 She had a severe attack of hysteria on the 24th of September.
 I saw her on the 25th and 26th. A communication was
 made to me. I have heard the evidence of the other medical
 witnesses. I should say that in some constitutions hysteria
 is very likely to follow non-consummation.

Cur. adv. vult.

June 16. THE JUDGE ORDINARY: This was a petition for a decree of
 nullity of marriage on the ground of the impotency of the
 respondent. The petition alleged, that on the 2nd of July,
 1861, a ceremony of marriage was in fact had between the
 petition and the respondent; that after the marriage, until
 the 27th of September, the petitioner cohabited with the re-
 spondent, but by reason of his malformation he was, and had
 continued, incompetent to consummate the marriage; that the
 malformation of respondent is congenital and incurable by
 art or skill, as on inspection by experts will appear; that the
 petitioner is a virgin intact, as on inspection by experts will
 appear. The respondent did not appear. At the instance of
 the petitioner, inspectors were appointed, who examined the

person of the respondent, and made the following report. [The learned Judge here read the above report.] No report was made as to the state of the petitioner; but she appeared as a witness, and deposed that during her cohabitation with respondent, he made two attempts to consummate the marriage, but did not accomplish it. The medical men who examined and made a report as to the state of the respondent, examined the petitioner also, and their evidence was equivocal as to her state. Had I deemed it possible to pronounce a decree of nullity under the circumstances proved before me, I should have desired to have a formal report from the medical men as to her condition. But even assuming her to be a virgin intact, I cannot make the decree prayed, for the medical men negative malformation; they negative impotency from disease or natural infirmity; but they ascribe the non-consummation of the marriage to temporary incapacity, occasioned by the indulgence of a disgusting and degrading habit, and believe that such incapacity will continue until that habit is corrected, but no longer.¹ Moreover, the cohabitation continued but little more than two months. Now, where any manifest and incurable defect exists, the old rule as to triennial cohabitation has been relaxed; but even in such cases the Court has never, that I am aware of, proceeded on so short a cohabitation as in this case. Here I have no right to assume that the incapacity will be permanent; and, however painful it may be to the petitioner to resume cohabitation with the respondent, I feel bound to follow the precedent of Sir George Lee in *Welde v. Welde*, 2 Lee, 585, and dismiss the petition. In that case he decreed a monition that the petitioner should return to cohabitation; I am not sure that I ought to do so, unless such process is prayed for by the respondent, and therefore at present abstain from doing it.

1863.

June 15 & 16.

S—
 (falsely called
 E—)
 v.
 E—.

¹ Compare *W. v. H.* (falsely called *W.*), 2 Swab. & Trist. 240.

1863.

July 8.

COOKE

v.

COOKE.

(Before THE JUDGE ORDINARY, WIGHTMAN, J., and CHANNELL, B.)

COOKE v. COOKE.

Judicial Separation.—Condonation of Cruelty.

This was an appeal by the husband from a judgment and decree of the Judge Ordinary, by which he decreed a judicial separation, on the ground of the husband's cruelty (see *ante*, p. 26).

The case was originally tried by the Judge Ordinary without a jury, and the appeal was argued by the *Queen's Advocate* and *Mr. Aspland* for the appellant, and by *Dr. Spinks* and *Mr. J. P. Murphy* for the respondent, on the notes of the evidence as taken by the learned Judge Ordinary.

In the following short judgment the Full Court confirmed in all points the judgment appealed from, and appear to have agreed with and adopted all the remarks of the Judge Ordinary on the different questions raised.

Judgment was delivered by WIGHTMAN J.: This is an appeal from the judgment of the Judge Ordinary to the Full Court, in a case in which he had pronounced a decree, in favour of the present respondent, for a judicial separation from her husband on the ground of cruelty.

The appellant in his petition stated four grounds for reversing the decree and dismissing the suit: first, that the alleged cruelty was not sufficiently established; secondly, that if it was, it had been condoned; thirdly, that there was unreasonable and unnecessary delay in instituting the suit; and fourthly, that the petition was brought for collateral purposes, and not for the protection of the person of the wife.

We are of opinion that the appellant has failed in making out either of the above grounds of objection to the decree. It is not necessary to state in detail the circumstances which were proved to establish a case of cruelty, but we are clearly of opinion that the evidence was abundantly sufficient to warrant the decree on that ground.

And the next question is, whether the wife had condoned the cruelty which we think had been sufficiently proved ; and we are of opinion that there was no such condonation as would afford an answer to the suit. The wife appears to have been willing to condone, provided she was treated by her husband in the manner she had a right to expect, if she returned to live and cohabit with him. She was not, upon her return to him, treated by him in the manner she ought to have been ; but, on the contrary, her husband's behaviour then was such, that she might well apprehend that it would not be safe for her to continue to live with him ; and, upon non-compliance with that which was a condition of condonation, the offences said to have been condoned were revived. And the second ground of objection also in our opinion fails.

But it is said that there was unnecessary and unreasonable delay in prosecuting the suit, and that, in truth, the object of the suit was not to protect the person of the wife from violence, but to enable her to have more free and frequent access to her children. The case of *Matthews v. Matthews*, 1 Swab. & Trist. and 3 Swab. & Trist., 29 L. J. 118, is clearly distinguishable from the present, for the reasons given by the Judge Ordinary in his judgment in this case ; and we are of opinion that the reluctance of the wife to prosecute the suit against her husband is no bar to her proceeding, she being willing to have lived with him, if she could have done so with due regard to her personal safety ; and that as she could not have such access to her children as she was entitled to have, unless she either returned to live with her husband, or was separated from him by judicial sentence, and her evidence showed that she had reasonable ground for apprehending personal danger, if she did return to him, we are of opinion that she was well warranted in prosecuting her suit, though one object may have been that she might have access to her children, from which she was debarred by her fear of personal violence, if she returned to live with him. Upon the whole,

1863.

July 8.

COOKE

v.

COOKE.

1863. then, our judgment is in favour of the respondent, Frances
 July 8. Judith Cooke.

COOKE
 v.
 COOKE.

Cooke v. Cooke.

July 14.
 COOKE
 v.
 COOKE.

*Judicial Separation for Husband's Misconduct.—Custody of an
 Idiot Child.—Jurisdiction of Court.*

Where a wife had obtained a decree for judicial separation by reason of the husband's misconduct, the Court refused to give her the custody of one of the children of the marriage, who was an idiot and of the age of twelve years, on the ground that the Court would only deprive the father of the custody of his child in favour of the innocent wife, when it was for her solace that she should have such custody.

In this case the Judge Ordinary had pronounced a decree of judicial separation on the petition of the wife by reason of the husband's cruelty. This decree was affirmed on appeal to the Full Court. An application was now made on behalf of the petitioner (the wife) for the custody of one of the children, a boy of the age of twelve years, who had been an idiot from his birth, in order that she might place him in an asylum.

Dr. Spinks appeared for the wife: It was a matter entirely for the discretion of the Court.

The Queen's Advocate (Sir R. Phillimore, Q.C.) for the husband.

THE JUDGE ORDINARY: I have been in the habit of considering the question of the custody of children with reference to the merits and demerits of the husband and wife. Where the wife has been the innocent party, I hold that she ought not to be deprived of the solace of having the custody of her children.

The question raised in reference to the custody of this child would involve the Court in considerations which are foreign to its jurisdiction. I think this is a question which would more properly belong to the Court of Chancery.

1863.
July 14.
COOKE
v.
COOKE.

The Queen's Advocate stated that there was an affidavit of a gentleman, who had been the medical attendant of the family for thirty years, from which it appeared that the child was under proper care.

THE JUDGE ORDINARY: I decline to interfere.

BREMNER v. BREMNER AND BRETT.

Petition for Alimony.—Wife in Possession of Husband's Property.

May 12.

BREMNER
v.

BREMNER AND
BRETT.

Allegation by the husband, in answer to the petition for alimony (*inter alia*), that the wife had taken from his house furniture, etc., of the value of from £800 to £1000. The Court refused to make any order for alimony *pendente lite* on such a state of things, the wife declining to accept the sum offered by the husband, but allowed the wife to reply to the above allegation in the answer.

In this case, the husband's answer to a petition for alimony *pendente lite* admitted an income of £600 per annum, and contained the following paragraph:—"I have no furniture, "books, pictures, etc., above the value of £10, inasmuch as "the said Sarah Bremner (the wife), during my absence, left "my said house and removed all my valuable furniture and "property, which I then estimated at £800 or £1000, and "left me a few articles, which were afterwards valued and sold "by me, for £50 or thereabouts."

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Mr. G. H. Cooper now moved the Court to allot to the wife alimony *pendente lite* at the rate of £120 per annum, being one-fifth of the income admitted by the husband in his answer.

Dr. Spinks : The wife is not entitled to one-fifth, as she is in possession of property of the husband which she has wrongfully taken. The husband is willing, however, that alimony at the rate of £60 per annum should be allotted, if she will return the property.

Mr. G. H. Cooper : The paragraph in the answer is consistent with what I am instructed is the case, viz. that the wife took possession of the furniture with the husband's consent. [THE JUDGE ORDINARY : I think that paragraph is not consistent with consent ; and if you do not accept the offer of the husband, as the wife is charged with the possession of property which would enable her to maintain herself pending the suit, she must, for the satisfaction of the Court, give some account of it before alimony is granted.] Taking the value of the furniture, £800, the husband in respect of it is entitled only to deduct from the sum that would otherwise be allotted, 4 per cent. interest on £800. [THE JUDGE ORDINARY : No. The furniture must not be taken as the wife's capital. As you refuse to accept the offer, I decline to allot alimony at present.] I am instructed that if the wife is allowed to answer the allegation in the answer, it can be proved that the furniture is of much less value than that stated, and that it was taken with the husband's consent.

THE JUDGE ORDINARY : I will allow the motion to stand over, in order that the wife may answer the statement in the answer ; but I will not allow her the costs of this motion.

Affidavits were afterwards filed on behalf of the wife, and

on the 27th of May alimony *pendente lite* was allotted by consent.

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May 12.

(*Before the Full Court*,—THE JUDGE ORDINARY, WILLES, J., and
CHANNELL, B.)

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*Suit for Judicial Separation.—Compromise.—Reference to
Arbitration.—Fraud.—Error.*

Where a wife, a petitioner in a suit for a judicial separation, had entered into a compromise, by which the record was withdrawn from the jury, and the terms of the separation were to be settled by an arbitrator, it was held on appeal, affirming the judgment of the Judge Ordinary, that the petitioner was not at liberty to repudiate the agreement, except on the ground of fraud, or of such an error in the terms of the agreement that she ought not to be bound by it.

This was an appeal from a decision of the Judge Ordinary. Mrs. Hooper, the petitioner, had filed a petition for a judicial separation by reason of the alleged cruelty of her husband, who, by his answer, denied the cruelty. The case came on for hearing before the Judge Ordinary and a special jury, on the 16th of June, 1859. Before the jury were sworn, it was arranged between the parties that the subject of dispute should be a matter of private arrangement. The jury were accordingly dismissed, and the following memorandum of agreement was drawn up and signed by counsel on behalf of the respective parties:—

“In the Divorce Court, *Hooper v. Hooper*: record withdrawn, proceedings to be stayed, and the suit not moved;
“Mr. Hooper paying the present alimony of £250 per annum ordered by the Court, and agreeing to add thereto £50 per annum. Mr. Brabant to be requested to settle the

1863. "terms of a separation by deed, with full power over the
"question of income.

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v.
HOOPER.

"(Signed) K. MACAULAY.

"MONTAGUE SMITH."

There was some delay in bringing the matter before Mr. Brabant. In the course of December, the agents of both parties met before him, when Mrs. Hooper's solicitor seems to have expected Mr. Brabant to go into the question of cruelty, alleging that the intention of the reference was to substitute Mr. Brabant for the Court, and that the question of cruelty or no cruelty might have a bearing upon the amount of income. He also urged that Mr. Hooper should pay Mrs. Hooper's costs as between solicitor and client. Mr. Hooper's Proctor, on the contrary, urged that Mr. Brabant's duty was to arrange the terms of a separation without going into the previous conduct of the parties. Mr. Brabant apparently took this view of his authority, and, under the circumstances, considered that he could proceed no further in the matter, and so informed them.

Mr. Wilde, Q.C., moved the Court for leave to re-enter the record and have the cause set down for trial.

This application was opposed by *Mr. M. Smith, Q.C.*

THE JUDGE ORDINARY rejected the application. (See 1 Swab. & Trist. p. 602.)

Mrs. Hooper appealed from this decision.

Mr. J. D. Coleridge and *Mr. A. Staveley Hill*, for the appellant: The terms of the agreement were not known to the Judge Ordinary. He relied entirely on the discretion of counsel that it was a reasonable one between the parties. No formal or definite step was taken by the Court upon the memoran-

dum ; its terms were only known to the counsel who drew it up. They were not known to the appellant until after the jury was withdrawn. We don't contend that counsel exceeded their authority, and made the arrangement without the sanction of their client, but that the terms in which it is framed are not clear. The interpretation put upon it by the respondent is not that which was put upon it by the appellant at the time it was made. The interpretation put upon it by the appellant is a reasonable one: she says, that the case is still in Court ; that she cannot obtain in her present position the redress which she would have had, and that therefore she is remitted to her legal remedy. [WILLES, J. : What are the benefits stipulated for by Mrs. Hooper which she cannot now obtain?] She has not been allowed to prove cruelty before Mr. Brabant for the purpose of increasing alimony ; and also her claim for costs. She is willing to be bound by the terms of the agreement, if they are capable of no other interpretation than that put upon them by Mr. Brabant. It is clear, looking at the terms used by her counsel upon the 16th of June, that it was always intended that the question of cruelty should be gone into before the referee. [WILLES, J. : Is alimony to be allotted in the ratio of the cruelty proved?] We contend that it is. The judgment in *Smith v. Smith*, 2 Phill. 235, is to that effect, and so in *Otway v. Otway*, 30 L. J. 109. [THE JUDGE ORDINARY : Those were all applications for permanent alimony, and not for alimony *pendente lite*. There having been no decree in this case, an allotment of alimony would not be of permanent alimony, and no such question can be raised in an application for alimony *pendente lite*.] Assuming that to be so, it is upon the principle that the Court will not decide upon the amount of alimony, because the facts upon which it is sought to obtain the decree have not been proved ; and we contend that by the referee not going into an investigation of the cruelty, the appellant is, as regards permanent alimony, placed in the same position as she

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would be had the question been the minor one of what amount of alimony *pendente lite* should be allotted to her. The Judge Ordinary was mistaken in speaking of the course pursued by the parties as being confirmed by "an order of the Court;" there has been no order made in this matter. The difficulty with regard to costs is, that no mention having been made of them in the argument, according to the view taken by Mr. Brabant, he was prevented from going into that question. The Judge Ordinary, however, refused to make any order for the taxation of costs, so that the appellant has, in fact, no means of obtaining them. It may also be a matter of grave consideration how far legally the wife may be considered, for the purposes of the suit, to cease to be under the control of her husband, so as to admit of her being empowered to restrict herself from any remedy she may lawfully have against him.

Mr. Montague Smith, for the respondent, said that Mr. Hooper was perfectly ready to pay costs as between party and party. (He was not further called upon by the Court.)

WILLES, J.: This is an application for a fresh trial, on appeal from the decision of the Judge Ordinary. The decision appealed from proceeded on the ground that when parties to a suit enter into an agreement for the withdrawal of proceedings, they are entirely bound by such an arrangement. This decision is now objected to on several grounds; first, and this has not been strongly urged, but I deal with it now as first in order of reasoning, that such a settlement is inadmissible, and that it is void by reason of the policy of the Matrimonial Law. This ground of objection is a novelty to my mind. I always thought that parties to a suit might settle that suit by private arrangement, and that if they did so, the Court before which such suit was depending would recognize that arrangement. Such a transaction is, in fact, equivalent to a judgment in the suit; and a court of common law would treat as

a breach of faith any attempt to proceed after that transaction, and would set aside anything done upon such an attempt. There is no difference, in point of principle, between suits in courts of common law and a suit here for a judicial separation, and no such distinction has been pointed out. When a matter is in litigation, and there is such a prospect of success on each side that an arrangement between the parties is a valid transaction, the Courts will always recognize such arrangement, and consider the parties to it bound by it; and when such an arrangement has been entered into between parties, neither of them can get rid of it, unless some of the causes which ordinarily invalidate an agreement can be established. Such causes would be either fraud, or a clear error of the party as to the nature of the agreement by which it is sought to bind him. Fraud being out of the question here, the learned counsel for the appellant must rely upon this, that there was such an error as to the terms of the agreement, that she ought not to be bound by it.

It is said that, in the first place, the costs were not provided for by this arrangement. I think that they are; but even if they were not, I do not say that the appellant could insist upon that omission as a sufficient cause for her not being bound by the agreement. She has made no such statement. I understood Mr. Smith to say that the respondent ought to pay the costs of suit in the ordinary way; that he undertakes to do so. That objection is therefore disposed of.

The next objection has no existence in point of fact. It is that, by the terms of the arrangement, Mr. Brabant was to draw up a settlement by deed, and to allot alimony having regard to the respondent's income. As matters stand at present, the appellant is precluded from going into the question of cruelty to show that it was of such a character as to render necessary an increase of alimony. It was to be taken as a conceded fact, that the cruelty was such as to entitle Mrs. Hooper to the relief prayed, and that instead of that

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relief being given her by this Court, a deed was to be drawn up by Mr. Brabant; that, in addition, she was to have a sum as auxiliary to this alimony of £300 per annum, but that Mr. Brabant was to be at liberty to fix the amount. He was to have full power either way over questions of income. Mr. Brabant was not by that arrangement to go into any question already disposed of; he could not therefore go into the question of cruelty at all, and the appellant must make out that before she can sustain this objection. The appellant says, however, that these terms do not correctly represent what it was that she agreed to, and that it was the whole question in the cause which she intended to refer. It is upon the face of the question which thus arises, that unless she make out that the amount of cruelty affects the amount of alimony, she fails. Upon this point many cases have been cited; it is an important question, and one which ought not to rest simply upon *obiter dicta*. Alimony is granted for the purpose of giving a wife a subsistence. It has been considered, both in the ecclesiastical courts and in the courts of common law, that a husband who compels his wife to depart from him by his misconduct is liable to support her. It has been said at common law, that the husband sends his wife out with his authority to obtain everything necessary for her comfortable subsistence, having regard to his income and position; in neither court does the wife obtain damages against her husband. (*Cooke v. Cooke*, 2 Phil. 45.) This doctrine is traceable to the obvious principle that nothing can compensate a wife for the injury thus done to her, and the law, with wise policy, attempts no such compensation. That which cannot be given in a lump by way of compensation, cannot be given yearly by way of increased alimony. The Court may, perhaps, through infirmity of human nature, not be able to resist the influence, which the proof of great cruelty may have upon it; and some cases may therefore be found where the result that is contended for on behalf of the appellant may

appear to have followed. I have inquired into the authorities, and I should have received any that could have been cited to me with the highest respect; and I should have also, without acquiescing in it, submitted to any enactment to that effect. None such can, however, be cited. *Smith v. Smith* was a very peculiar case: the judge was there dealing with property which had been transferred to the husband by the wife "to buy off his cruelty." He did not decide, however, that the extent of that cruelty was to determine the amount of the alimony. The question of the maintenance of children was also a material feature in that case. Sir John Nicholl speaks of alimony as a comfortable subsistence in accordance with the husband's income. This is the principle upon which both the ecclesiastical courts and the courts of common law have acted, and upon which we ought to act. I am clearly of opinion that it never intended that alimony should be aggravated by the number of blows given, and that neither in this nor in any other case ought it to be held, that the Court can give incidentally to the wife damages for injuries, when by law no such damages can be given. The foundation, therefore, for this objection fails.

I abstain from commenting upon the evidence by which it is sought to sanction this objection, further than to say that Mr. Clarke's affidavit shows that it was not intended originally to take any such objection, and I can only attribute this attempt to resist a solemn agreement to a mere afterthought.

I am clearly of opinion that the Judge Ordinary was right, and that this appeal must be dismissed.

CHANNELL, B.: I agree with my brother Willes that the agreement, to which reference has been made in this case, justified the order made by the Judge Ordinary.

As to the costs, I see no ground for supposing that the appellant was to have costs as between attorney and client; that

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question is now, however, disposed of. It has been said that this suit is still alive, and I do not say that it is dead, so that, under no circumstances, could any proceedings be taken in it. It is not necessary to go so far, and to determine whether this agreement is equivalent to a judgment of the Court; nor do I doubt, that if the referee had refused to proceed, the parties might have come before this Court again, as they would do in a court of common law, when a reference in any manner becomes defunct.

The appellant says that the referee refused to proceed in the way that it was intended, and that she has a right to call upon him so to proceed; and the 32nd section of the 20 & 21 Vict. c. 85, which directs that the judge, in allotting alimony upon a decree of a dissolution of marriage, is to have regard to "the conduct of the parties," has been relied on as presenting an analogy to the present case. It is argued that by the "conduct of the parties" is intended the amount of the charge proved against a delinquent party. To make the argument applicable here, reference has been made to certain authorities, as showing that the Court has, before allotting alimony, inquired into all the circumstances of the cases, and has allotted it in proportion to the conduct of the parties. Those cases certainly may seem to support that view; but all these inquiries, as far as I understand, have been into the *status* of the parties. There are certain expressions, however, which give a colour to the arguments of the appellant's counsel. With regard to *Smith v. Smith*, I adopt the view taken by Willes, J. In deciding what proportion of the husband's property should be taken, all such inquiries as to the *status* of the parties appears to be legitimate. In the present case the parties came to a conclusion which was to operate as final, and which would attain the main object of the suit. If this question of cruelty ought to be attended to, it follows that it was to be investigated for the purpose of mulcting the guilty party. I am of opinion, however, that it could not legitimately be so

used. There is no suggestion of any misrepresentation having been made to the wife before she consented to enter into this compromise, and her authority was, I think, obtained to that agreement. It seems to me, therefore, that there is no ground for saying that this agreement is not binding.

Appeal Dismissed.

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v.
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(*Before the Full Court and a Special Jury*,—THE JUDGE ORDINARY,
WILLES, J., and HILL, J.)

1860.

May 3.

CALLWELL v. CALLWELL AND KENNEDY.

CALLWELL
v.
CALLWELL
AND
KENNEDY.

Dissolution of an Irish Marriage.—Parties Domiciled in Ireland.—Adultery.—Damages.—Arrangement by Counsel as to Amount.—Settlement of Damages.—Marriage Settlement.

Where a husband was domiciled in Ireland, and had only a temporary abode in England at the date of filing the petition, and the wife appeared and submitted to the jurisdiction of the Court, the Full Court dissolved their marriage, which had been celebrated in Ireland, on the ground of adultery committed by the wife in England and on the Continent.

The Court is not at liberty to recognize an agreement made between the counsel of the petitioner and co-respondent in respect of the amount of damages to be paid, but is bound by the assessment of the jury.

Where the petitioner had entered into a covenant binding his estate with the payment of an annuity to the respondent, in the event of her surviving him, the Court directed the annuity, when recovered, to be paid for the benefit of the children of the marriage.

The petition in this case was filed by a gentleman domiciled in Ireland, William Callwell, Esq., described in the petition "as of Newberry, Kilcullen, in the County of Kildare, Ireland, but at the present time residing at 35, Bury Street, "St. James's," for a dissolution of his marriage with the re-

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May 8.

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spondent, on the ground of her adultery with the co-respondent, from whom he claimed £3000 damages. The respondent and co-respondent had respectively entered appearances, and had filed answers denying the adultery charged.

The case came on for trial before the Full Court and a special jury, when,

Dr. Phillimore, Q.C., and *Dr. Tristram*, appeared for the petitioner.

Mr. T. Jones for the respondent.

Mr. Serjeant Pigott and the *Hon. R. Bourke* for the co-respondent.

It appeared by the evidence that the marriage was celebrated in Ireland, according to the rites of the United Church of England and Ireland; that the petitioner and respondent, both before and after the marriage, and up to the time of the adultery complained of, had resided in Ireland. It also appeared that the respondent had, in June, 1858, eloped from Ireland, and had committed the adultery complained of in England and at divers places on the Continent. There were four children born during the cohabitation of the petitioner and respondent, and the respondent had had one son born since she eloped, which was supposed to be the child of the co-respondent.

Pending the trial in Court, an arrangement was entered into between the counsel for the petitioner and co-respondent to the effect, that the damages to be paid should be fixed at £1500; and that if the jury by their verdict gave a larger sum, the damages should be reduced,—and if they gave a smaller sum, they should be increased,—to this amount.

There was some discussion amongst the learned judges as to the jurisdiction of the Court to dissolve an Irish marriage

upon the facts admitted and proved, but they considered that as the wife had submitted to the jurisdiction of the Court, they might pronounce the decree prayed.

The jury found a verdict for the petitioner, and assessed the damages at £3000.

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KENNEDY.

May 5.

An application was now made to the Court in reference to the settlement of the damages, and also to alter the marriage settlement, which was an Irish settlement.

By the settlement the respondent was entitled to the life-interest in a sum of £1314. 12s. 3d. after the death of her father, and which was, after her death, settled upon the petitioner absolutely; and the petitioner had also entered into a covenant in the settlement for his heirs, executors, and administrators to pay to her, in the event of her surviving him, an annuity of £400 a year.

A petition had been filed setting forth the purport of the settlement and of the arrangement entered into respecting the damages.

Dr. Phillimore, Q.C. (Dr. Tristram with him), moved the Court to pronounce a decree dissolving the marriage; to settle the damages (£1500) on the respondent, and to declare the covenant contained in the settlement for payment of the annuity null.

Mr. Serjeant Pigott (The Honourable R. Bourke with him) applied that the damages paid and settled should be limited to the sum of £1500 in pursuance of the arrangement.

THE JUDGE ORDINARY: It would be a most dangerous thing to recognize any arrangement come to between the parties as to the amount of damages to be paid. The jury by their verdict assessed the damages at £3000, and we think the Court and parties are bound by the finding of the jury.

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May 3.

CALLWELL
v.
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KENNEDY.

HILL, J.: The legislature has carefully taken the question of damages out of the hands of the petitioner. They are placed entirely under the control of the Court. The Court cannot be bound by any agreement entered into by the petitioner in respect of them without its sanction.

Mr. T. Jones said the respondent was willing to give up her claim to the annuity of £400, but asked that the sum of money which came to her on her father's death should be settled on her absolutely. *Cur. adv. vult.*

July 2.

THE JUDGE ORDINARY now delivered the judgment of the Court.

In this case we were asked to deal with three sums:—£1384. 12s. 3d., to the interest of which the wife is entitled for her life after the death of her father; £3000 damages assessed by the jury; and an annuity of £400, which the petitioner, on his marriage, covenanted should be paid to his wife for her life, in the event of her surviving him.

As to the first sum, we think that section 45 of the Divorce Act gives us no power over the interest of the husband, to whom the principal sum is given after the wife's death, and we do not think it right to interfere with her life-estate in the interest.

Of the £3000, we order £1500 to be expended in purchasing an annuity for the wife, to be settled on her without power of anticipation.

The remaining £1500, less expenses, to be invested in the funds, the interest to be paid to the wife for life; the principal sum after her death to go to the child born since the separation of the petitioner and his wife.

All money recovered by the trustees under the covenant to pay an annuity of £400, to be applied by them to the education and maintenance of the children of the petitioner and respondent born previously to the separation.

The Court pronounced a decree dissolving the marriage, and directed the above directions to be embodied in the decree.

1860.

June 2.

CALLWELL
v.
CALLWELL
AND
KENNEDY.

Note.—The following was the order as settled in the registry :—

The judges aforesaid made no order with respect to the sum of £1384. 12s. 3½d., to the interest of which the respondent is entitled for her life after the decease of her father ; and with respect to the sum of £3000, being the amount of damages assessed by the jury in this cause, directed the sum of £1500, the half-part thereof, to be placed in the hands of Augustine Hugh Barton, of 23, Fitzwilliam Square, Dublin, Esq., barrister-at-law, and Thomas Barklee, of Inver House, Sarne, in the county of Antrim, in Ireland, the trustees agreed upon by the parties, to be by them expended in the purchase of an annuity for the respondent during her natural life, but so that she should not have any power of anticipating the same ; and further ordered the sum of £1500, being the remainder of the said sum of £3000, to be placed in the hands of the said trustees, to be by them invested in the funds in their names, and for them to pay the dividends arising therefrom to the said respondent during her life, and after her decease to pay the principal to the child of her, the respondent, born since the separation of the petitioner and respondent ; and with respect to the annuity of £400 which the petitioner by his marriage-settlement covenanted should be paid to his wife for her life, in the event of her surviving him, ordered the trustees of such settlement to apply all money received by them under the said covenant towards the maintenance and education of the children of the petitioner and respondent born previously to the separation.

The order then proceeded in the usual terms to pronounce the marriage dissolved.

1861.

June 5.

PETERS
v.
PETERS AND
WILLETT.

PETERS v. PETERS AND WILLETT.

Petition for Dissolution.—Several Adulterers.—Leave to proceed without making a Co-Respondent.

Where the wife, the respondent, was alleged to be leading the life of a common prostitute and to have committed adultery with several persons, who were necessary witnesses to enable the petitioner to establish the charges of adultery, the petitioner was allowed to proceed without making a co-respondent.

This was an application on the part of the petitioner (the husband) for leave to dispense with making a co-respondent.

The wife, as it appeared from the affidavit of the petitioner, was leading the life of a common prostitute, and had committed adultery with divers persons, and in particular with Dr. M. M'Dermot, who was the only witness he should be able to produce to establish the identity of the respondent, and with several other persons, whose names were known, but who were the only persons whom he could call to establish the respondent's adultery.

Dr. Wambey moved, on the part of the petitioner, for leave to proceed without making a co-respondent. By the 28th section of the Divorce Act, the Court had authority, on *special grounds*, to grant such leave. Where the wife is charged with having committed adultery with so many persons, if he were to make them co-respondents, he could not examine them as witnesses, and, under the circumstances, would be unable to establish the adultery.

THE JUDGE ORDINARY : Under the circumstances stated, the petitioner may proceed without making a co-respondent.

CASES

IN THE

COURT OF PROBATE.

**THE GUARDIANS OF THE POOR OF THE HAMLET OF MILE-
END OLD TOWN AND OTHERS v. FINDLAY AND OTHERS.** 1863.
July 14, and
Nov. 8 & 10.

In the Goods of JANE FINDLAY (Widow), deceased.

*Next of Kin a Pauper Lunatic.—Administration under sect. 73
of Probate Act to Guardians of the Poor.*

Guardians of
the Poor of
Mile-End Old
Town

v.
FINDLAY.

J. F. died intestate and a widow, leaving M. F., her daughter, the only person entitled in distribution. M. F. had been for some years in the county lunatic asylum, maintained at the charge of the hamlet of Mile-End Old Town. No committee of person or estate had been appointed.

In the Goods of
JANE
FINDLAY.

J. F. left a sum of money, principally in the funds, in the name of her late husband, under whose will she was entitled to it.

After the proper citations, the Court, under sect. 73 of the Probate Act, granted administration of the goods of J. F. to the Clerk of the Guardians of the Poor for the use and benefit of the lunatic, limited till the period of her lunacy; the sureties to justify.

This was an application for a grant of administration to E. J. Southwell, clerk to the above-named Guardians, and their nominee for the present purpose, of the personal estate of the above deceased.

Jane Findlay died on the 19th of August, 1856, intestate, a,

1863. widow, leaving Mary Findlay, spinster, her natural and lawful only child, and the only person entitled in distribution. The deceased left about £450, principally funded property, standing in the name of her late husband, William Findlay, who died on the 3rd of August, 1856, and under whose will she derived the money.

July 14, and
Nov. 8 & 10.

Guardians of
the Poor of
Mile-End Old
Town

v.
FINDLAY.
In the Goods of
JANE
FINDLAY.

Mary Findlay, aged about forty-eight, had since the year 1852 been of unsound mind, and was still confined in the Middlesex County Lunatic Asylum at Colney Hatch, where she had been maintained as a pauper lunatic at the charge of the hamlet of Mile-End Old Town.

No committee of the person and estate of Mary Findlay had been appointed. The above-named Guardians had incurred charges in respect of the said Mary Findlay to the amount of £237. 2s. 6d. up to the 6th of September, 1861, the only security for which was an order of two justices of the peace for the county of Middlesex, under the 16 & 17 Vict. c. 97, s. 104, directing the said Guardians, or Mr. E. J. Southwell, their clerk, or the relieving officers of the hamlet, to seize so much of any moneys, etc., of the said Mary Findlay, as might be necessary to pay the charges of the said Guardians, and duly to account to the said justices for the same. Certain uncles and aunts were the only next of kin of the said Mary Findlay. They had been cited to take letters of administration of the personal estate of Jane Findlay for the use and benefit of the lunatic and during her lunacy, or to show cause why the same should not be granted to E. J. Southwell, as clerk of the said Guardians. None of the next of kin had appeared to this citation.

A citation had been served on Mary Findlay, the lunatic, in the presence of Mr. Marshall, surgeon of the Colney Hatch Lunatic Asylum, having charge of the said lunatic, and on Mr. W. Robinson, the only next of kin of the said lunatic residing in England. Inquiries had been made as to any creditors of William or Jane Findlay, but it did not appear that

they left any debts owing at the time of their respective deaths. 1863.

July 14, and
Nov. 3 & 10.

Dr. Deane, Q.C. (*Mr. Pritchard* with him) moved the Court accordingly, stating that he knew of no exact precedent. Guardians of the Poor of Mile-End Old Town

SIR C. CRESSWELL: If, as your statement is, Mary Findlay is a pauper lunatic, the parish is bound to maintain her. If the Guardians apply as creditors, to whom do they stand in that position? I must take time to consider the application. *FINDLAY.*
In the Goods of JANE FINDLAY.

Cur. adv. vult.

The motion was renewed before Sir J. P. Wilde on the 3rd of November.

SIR J. P. WILDE: I think it is reasonable that the money which belongs to the pauper should be applied in payment of her subsistence; and if it can be done in no other than the mode now asked, I should wish, if I can with propriety, to grant this motion, but as no principle or conclusive authority has been cited, I must take time for consideration.

Cur. adv. vult.

SIR J. P. WILDE: This is an application for letters of administration to be granted of the goods of Jane Findlay, who died a widow and intestate on the 19th of August, 1856, to Mr. Southwell, as clerk to the Guardians of the Poor of the hamlet of Mile-End Old Town. It appears that Mary Findlay, spinster, was her only child, and the only person entitled to her personal estate.

In 1852 Mary Findlay was admitted into the County Lunatic Asylum at Colney Hatch as a pauper, and from thence to the present time has been confined and maintained there at the expense of the before-mentioned hamlet. No committee of her person and estate has ever been appointed. The expenses incurred on her behalf by the hamlet amounted to

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£237. 2s. 6d. On the 6th of September, 1861, the Guardians of the Poor for the hamlet obtained an order from two magistrates to seize and sell so many of the goods of Mary Findlay as might be necessary to pay the above sum of £237 2s. 6d. The order recites that it has been proved on oath that the said Mary Findlay was entitled to a sum of money in the Bank of England, and another sum of money in the Poplar Savings Bank. It is also sworn on affidavit before the Court that Jane Findlay, the mother, left personal estate of the value of £450. It is also sworn by the nurse and the medical attendant at the asylum, that there is no hope of the recovery of Mary Findlay to soundness of mind. Search has been made for creditors of Jane Findlay, but none found. The next of kin of Mary Findlay have been cited, but have not appeared.

It is under these very unusual circumstances that the Court is asked for a very unusual grant. Those who apply for the grant are substantially creditors of the next of kin of the deceased. That character would not (so far as I have been able to discover) of itself entitle them, according to the practice of this Court, to the grant they seek. There have no doubt been exceptional cases, though none that govern this; but the general rule would require something of a representative character in the person who seeks a grant on behalf of the next of kin. This character is here wanting, and if the Court pronounces for this grant, it must do so under the powers conferred by section 73 of the Probate Act. These powers are exercised with some reluctance; but the true function of the Court is to facilitate the collection and distribution of the estates of deceased persons, and not by any technical rules to impede that distribution.

If the administration now asked is refused, to whom can the estate be confided? The next of kin of the lunatic refuse to interfere, and there is no one who represents her. She is lunatic, and therefore cannot act herself; the grant must therefore go as prayed. It will be made under the powers

conferred by section 73 ; it will be for the use and benefit of the lunatic, and limited to the period of her lunacy. Furthermore, an inventory and justified security will be required.¹

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In the Goods of TYERWHIT PULMAN (deceased).

Nov. 8 & 10.

Will.—Executors “in India”—“in England.”—Form of Probate.

In the Goods of
TYERWHIT
PULMAN.

P., by his Will, appointed C. and D. “executors of my Will in India,” and W. “sole executrix of my Will in England.” On an exemplification of probate granted in Calcutta to C. being sent home, probate was granted in the principal registry to W., as one of the executors of the Will, reserving power of making a similar grant to the other executors in the Will. The Bank of England objected to the reservation of this power. But the Court refused, on motion on behalf of W., to direct the probate to be altered.

In this case the deceased executed a will in India, which contained an appointment of executors in the following terms: —“I appoint my said aunt Anna Maria Walker, spinster, my “sole executrix in England;” “Lieut.-Col. F. W. Swinhoe “and Charles Richard Frances, executors of this my will in “India.”

Probate was granted to Colonel Swinhoe, at Calcutta, on the 26th of May, 1863. An exemplification of this probate was sent to England, and a grant was made at the principal registry to Miss Walker, as one of the executors of the will,

¹ In *Williams v. Allen*, before the Master of the Rolls, 19th of November, 1863, where a person, aged fifty, of unsound mind, though not found so by inquisition, was possessed of a fund in Court, which was her whole fortune, it was ordered to be paid out to her mother, who undertook to maintain her. (9 L. T. R. n. s. 405.)

1863. power being reserved of making a similar grant to Swinhoe
 Nov. 8 & 10. and Frances, the other executors in the will. On presenting
 In the Goods of this probate in the Bank of England, it was objected that the
 TYRREWHIT reservation of the power of granting probate to Swinhoe and
 PULMAN. Frances was wrongly inserted, and the bank refused to act on
 the probate.

Dr. Spinks now moved the Court to direct the probate to be altered, by striking out the reservation of the power or to issue a fresh probate omitting it. Miss Walker is the only person entitled to represent the deceased in England.¹ It is understood that there is a difficulty felt in the registry as to the term "sole executrix in England," viz. whether it is equivalent to "sole executrix for England." It is submitted that it can only be construed as a full equivalent. If so, the reservation of the power is wrongly inserted, and as the executors resident in India may, under this power, obtain probate in common form on their return to this country, Miss Walker is entitled to be protected against that. In case of her death leaving an executor, it is submitted that such executor would be the proper representative of the deceased in this country, and not the deceased's executors in India, who, under the power reserved in this probate, must take the grant.

Cur. adv. vult.

November 10. SIR J. P. WILDE: This is an application made by Mrs. Anna Maria Walker to revoke a grant of probate, which was made to and accepted by her, of the will of Mr. Tyrrewhit Pulman, dated the 6th of February, 1863, and for the grant of a new probate of that will to her, or in the alternative for an alteration of the probate so already granted. The existing grant is "to Anna Maria Walker, one of the executors named "in the will, etc." And then follow these words:—"Power "is reserved of making the like grant to F. W. S. and C. R.

¹ See Williams on Executors, 219, 5th edit.

"P., the other executors named in the said will." It is this reservation that she now objects to, and the substance of her prayer is that probate may be granted to her absolutely as sole executrix.

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In the Goods of
TYREWHIT
PULMAN.

Now the above persons are no doubt named in the will as executors, but her contention is that, according to the true construction of the will, they were intended to be executors for India only, and not for the assets in this country. The registrar of this Court took a different view of the testator's meaning, and inserted the above reservation accordingly, in order that if the other executors at any time came forward and desired to act in this country, there should be no impediment in the way of such claim. The Court does not propose to itself to decide on the present occasion which view of the testator's intention was correct, for it is unnecessary to do so. The grant already made to Mrs. Walker gives her every power which any probate can give her over the estate in this country, and by entering a *caveat* she can secure to herself the opportunity of challenging the right of the other executors to a similar grant, should they claim it.

What, then, is the objection to the probate as it now stands? Why simply this, that the Court has reserved a power of granting probate also to the other executors if they should claim it, and if the Court should, after hearing their claim, consider them entitled to receive it. What Mrs. Walker asks is, that the Court, without hearing the other executors, should bind itself not to entertain their claim. But, singular as this demand is, after she has already accepted the grant which she now wishes to alter, the reason for making the demand is more singular still. It is as follows:—The Court learns, with some surprise, that some person at the Bank of England has felt himself called upon to exercise his judgment in construing the will, and has come to the conclusion that Mrs. Walker's probate ought to have been granted in a different form, and entertaining this opinion, he has therefore refused to act upon

1863. it. This is a misfortune, the remedy for which does not lie
 Nov. 8 & 10. within the province of this Court to point out, but it forms
 In the Goods of no reason whatever for the alteration of the present probate,
 TYRREWHIT and the application is therefore refused.
 PULMAN.

November 10. In the Goods of CHARLES ROBERT SPERLING (deceased).

In the Goods of
 CHARLES
 ROBERT
 SPERLING.

Will.—Attestation.

The deceased having signed his Will in the presence of a servant, the latter subscribed "Servant to Mr. Sperling," without any name. A solicitor, the other attesting witness, had directed him to sign as servant to Mr. Sperling :

Held, a sufficient attestation and subscription.

In this case, the deceased died on the 8th of July, 1863, leaving a will bearing date the 28th of March, 1863, to which there was a full attestation clause, followed by the signature "George W. Harris, Solicitor, Halstead, Essex," and then, in a different handwriting, the words "Servant to Mr. Sperling," but no name. Mr. Harris stated on affidavit, that on the 28th of March he attended at Stanmore manor-house to get the will executed, that Mr. Sperling was wheeled into the library, and that Thomas Saunders, who had been for some time in attendance upon Mr. Sperling, was called in and informed that Mr. Sperling was about to execute his will, to which Thomas Saunders's signature, as well as that of Mr. Harris, would be required to be subscribed as witnesses. That the deceased wrote his name in the presence of Harris and Saunders, and Mr. Harris having signed his own name, turned to Saunders and said, "Now sign yourself here as servant to "Mr. Sperling," pointing to the part of the paper immediately

below his own signature. That Saunders then wrote the words "Servant to Mr. Sperling," and Mr. Harris being in a hurry to get to the train, folded up the paper without looking at it and placed it in an iron chest in the deceased's library. Thomas Saunders stated that he wrote the words "Servant to

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In the Goods of
CHARLES
ROBERT
SPERLING.

Mr. Sperling," intending such words to be his signature, and because he believed, from the direction given him by Mr. Harris, that it was the proper way of attesting the will.

Mr. Chitty moved for probate. He cited *The goods of William Oliver (deceased)*, 2 Eccl. & Adm. Reps. 57.

SIR J. P. WILDE: I think that there is a sufficient attestation and subscription. I am satisfied that Saunders wrote the words which appear on the will, intending thereby an identification of himself as the person attesting.

In the Goods of GEORGE JAMES HAY (deceased).

December 1.

Scotch Confirmation.—21 & 22 Vict. c. 56.—23 & 24 Vict. cc. 15 and 80.

In the Goods of
GEO. JAMES
HAY.

The schedule (E) annexed to 21 & 22 Vict. c. 56, being the form of confirmation of an executor nominate, runs, "An inventory of the personal estate and effects of the said C. D. at the time of his death, situated, etc.";

But the Court, looking to the provisions of 23 & 24 Vict. c. 80, s. 5, *Held*, that the words "at the time of his death" are, since that Act, properly omitted in Scotch confirmations, and directed such a confirmation to be sealed.

The deceased in this case died on the 21st of October, 1862, domiciled in Scotland, having by a certain trust-deed,

1863. disposition and settlement, and two codicils, appointed Lieut.-
 December 1. Colonel Hay, the Rev. Augustus Handley, and Alfred Atkin-
 son Pollock, executors, who had given upon oath an inventory
 In the Goods of GEO. JAMES HAY. of the personal estate of the deceased in Scotland and England.

In the *testament testamentar* tendered to the registrar of this Court for sealing, it was recited that the executors "have given upon oath an inventory of the personal estate and effects of the said Geo. Jas. Hay, Esq., situated in Scotland and England, amounting in value to £ , which inventory has likewise been recorded, etc."

It was objected in the registry that this was not a sufficient compliance with schedule E. annexed to 21 & 22 Vict. c. 56, as it omitted the words, "at the time of his death, situated, etc.," which are contained in the schedule. By the 10th section of the Act, confirmations shall be in the form, or as nearly as may be in the form, of schedules D. and E. thereunto annexed.

Dr. Swabey now moved the Court to direct the *testament testamentar* to be sealed in its present form. Admitting, for argument, that the words omitted did form a necessary part of the schedule when that Act passed, there are subsequent Acts to be considered, which, it is submitted, make the form adopted in the present *testament testamentar* the proper one. The 23 & 24 Vict. c. 15, sect. 6, enacts that money secured on heritable property and by heritable bonds in Scotland, is to be chargeable with probate and inventory duties. The 23 & 24 Vict. c. 80, reciting such enactment, and that it is expedient that the levying and collecting the said duty should be regulated as hereinafter mentioned, enacts by sect. 5 that the special inventory provided by this Act, and the inventory of the personal estate of the deceased containing also the property on which duty is imposed by the recited Act and this Act, shall be stamped with duty according to the value of the property contained therein at the time they shall be respec-

tively sworn to, including the proceeds accrued thereon down to that time. And it is hereby provided that the inventory and additional inventory of any person deceased, required to be exhibited and recorded in the proper Commissary Court in Scotland, shall be stamped with duty according to the value of the property contained therein at the time they shall be respectively sworn to, including the proceeds accrued thereon down to that time, etc. The last part of the section quoted seems general in its terms, and not limited to the particular duties imposed by the two Acts.

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SIR J. P. WILDE : I think that is so, and the confirmation will be sealed in its present form.

MITCHELL AND MITCHELL v. GARD AND KINGWELL.

Nov. 24 and
December 1.

(On Motion as to Costs.)

MITCHELL AND
MITCHELL
v.
GARD AND
KINGWELL.

Will.—Unsuccessful Opposition by Next of Kin.—Misconduct of Residuary Legatee.—General Rules as to Costs.

In considering the question of costs in probate causes, the Court will be guided by the two following rules :—first, if the cause of litigation takes its origin in the fault of the testator, or of those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be a sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

In the present case, the Court, holding that the misconduct of the residuary legatee gave the next of kin a reasonable ground for liti-

1863. gation, ordered their costs to be paid out of the estate, though they
 Nov. 24 and had failed to prove, *inter alia*, a plea of undue influence.
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 MITCHELL
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 KINGWELL.

This was a question of costs, arising out of a testamentary suit, the facts of which are sufficiently stated, *ante*, p. 75.

Mr. Karslake, Q.C. (*Mr. H. T. Cole* with him) now moved that the costs of the next of kin, the unsuccessful opponents of the will, should, under the particular circumstances of the case, be paid out of the estate. It seems doubtful whether any strict rule has been or can be laid down; but in the 4th edition of Coote and Tristram, Probate Practice, 263-4, the nature of the cases in which the Court has granted costs out of the estate to an unsuccessful suitor is indicated, and we submit the circumstances of the present case are such as to warrant the application, which is in each case within the discretion of the Court.

The Solicitor-General (Sir R. P. Collier) (*Dr. Wambey* and *Mr. Lopes* with him) prayed the Court to condemn the next of kin in costs. The case falls within the rule laid down in *Summerell v. Clements*, *ante*, p. 35. Besides the issue of incapacity, undue influence was pleaded and negatived by the verdict of the jury. The parties opposing the will should therefore be condemned in costs, or, at the best, the Court will make no order as to costs. *Cur. adv. vult.*

December 1. SIR J. P. WILDE: This was a testamentary suit. After a long and careful trial, conducted before Byles, J., at the assizes for the county of Devon, the will was here pronounced for and admitted to probate. The Court is now asked by the plaintiffs that their costs may be allowed them out of the estate, and by the defendants that the plaintiffs may be condemned in costs.

These questions of costs are addressed to the discretion of

the Court. It is hardly in the nature of discretion that its exercise should be adjusted by exact rule. No positive regulation could be established that would bear the strain put upon it by the justice or hardship of particular instances. But, where all is not possible, something may yet be done. By acknowledged method and general classification, the suitor may in some measure be enabled to estimate the prospect before him, and foresee the penalties under which he launches into litigation. To this extent it is the duty of the Court, so far as may be, to assist him.

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KINGWELL.

The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question, who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred? If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.

If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he by his own improper conduct has induced a litigation which the Court considers reasonable, it is not unjust that the estate should bear the costs of the litigation which his conduct has caused.

But if the testator be not in fault, and those benefited by the will not to blame, to whom is the litigation to be attributed? In the litigation entertained by other Courts, this question is in general easily solved by the presumption that the losing party must needs be in the wrong, and, if in the wrong, the cause of a needless contest. But other considerations arise in this Court. It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial in-

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quiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt.

There is still a further class of cases. I speak of those in which, beyond the execution of the will and the capacity of the testator, the opposing party takes upon himself to question the conduct or the good faith of others, and to place on the record pleas of undue influence or fraud. These are affirmative charges; they ought not to be made except upon some apparently very sufficient ground. But though they may and do differ largely in the degree of probability or suspicion to be demanded for their justification, it is not easy to say that they differ in nature from pleas denying execution or capacity. Both classes of defence are addressed to the same question, what was the will of the testator, and both are within the scope of the subject entrusted to the vigilance of the Court. Here, also, it seems just and meet, if the circumstances of the case have rendered the inquiry a proper one, that neither party should be condemned in costs.

From these considerations, the Court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

I am aware that there are many cases to be found in which

costs have been granted out of the estate under circumstances different from those I have predicated. I am aware also that in some cases a less liberal view than I have taken of the conduct of parties pleading undue influence and fraud has prevailed; but there are cases to be found pointing both ways. I have sought in vain in the authorities of the Prerogative Court, and especially in the reports of the Judicial Committee, for anything like a general classification or rule. Sir Cresswell Cresswell had to make the same confession in the case of *Broadbent v. Hughes*, 29 L. J. 134, Prob. I have also considered the cases reported in this Court. They will be found collected in a most useful and compendious note to the case of *Summerell v. Clements*, 32 L. J. 33, Prob. But it is hard to extract a general rule. It is of high public importance that doubtful wills should not pass easily into proof by reason of the cost of opposing them. It is of equal importance that parties should not be tempted into a fruitless litigation by the knowledge that their costs will be defrayed by others. These opposite reasons appear to have alternately swayed the decisions to be found in the books. It is the desire of the Court to keep both in view, while yielding to neither, and it is in this spirit that the above rules have recommended themselves for adoption.

Of the present case, on the facts, little need be said. I have carefully read the learned Judge's notes, and fully conferred with the learned Judge himself, by whose opinion I am strongly fortified in the decision I am about to pronounce. The Court considers that Mr. Gard, to whom the bulk of the property of the testatrix was bequeathed in a will made by himself, a professional man, has been guilty of improper conduct in the transaction, and particularly so in knowingly omitting from the will legacies which he knew (for so the jury found) that the testatrix had ordered and still desired, but which escaped her memory at the time the will was executed. This conduct, and the suspicions which flowed from it, gave the

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1863. next of kin a fair and reasonable ground for litigation. The Court therefore orders that the costs of the plaintiffs be paid out of the estate.

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1864. TWELLS v. CLARKE AND OTHERS (on motion).

January 16.

TWELLS
v.
CLARKE AND
OTHERS.

Pleading.—Leave to introduce New Plea.—Plea, “not the Will of Deceased.”—Practice.

Leave to introduce a new plea after issue joined will not be given unless the affidavit in support of the motion discloses such facts as, if proved in evidence, would warrant the plea.

If at the trial evidence of such facts were to be given, the Court would allow a corresponding plea to be added to the record, if it could be done without injury to the other party.

SEMPLE, a plea of “not the will of the deceased” means that the deceased signed the paper in question without intending it to operate as a testamentary instrument; and

Quære, whether the terms of such a plea ought not to be more precise than “that such a paper is not the will of the deceased.”

This was a question arising on the pleadings in a testamentary suit. The plaintiff propounded in a declaration in the usual form the will of Esther Cooke. The plea was incapacity.

Dr. Spinks, on behalf of the defendants, now moved for leave to add the plea, “that the said paper-writing alleged to “be the will of the deceased, etc., is not her will.” The motion was founded on an affidavit to the effect that, on placing the evidence before counsel to advise on behalf of the defendants, he considered that it would be prudent to apply to the Court for leave to add such a plea.

SIR J. P. WILDE: What is now asked can be done at the

hearing, if the evidence is such as to make the Judge think that such an addition would further substantial justice between the parties. The affidavit before the Court discloses no such facts as would entitle the party to an amendment of the pleadings now.

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Dr. Wambey, on behalf of the plaintiff, objected to the form of the plea proposed, on the ground of its vagueness; that, in fact, it involved every plea that could go to the validity of a testamentary instrument; that in *Cunliffe and Ormerod v. Cross*, ante, p. 37, where Sir C. Cresswell suggested the adoption of the plea, he seems to limit its meaning to this, that the deceased never signed the paper with the intention that it should operate as his will; if so, the plea should be *totidem verbis*, as in *Thorncraft and Clark v. Lashmar*, 2 Swa. & Tr. 480. In *Mitchell and Mitchell v. Gard and Kingwell*, ante, p. 75, the same plea seems to have caused great difficulty, and involved part of the case in considerable obscurity.

SIR J. P. WILDE: The proper office of the plea no doubt is, to show that though the deceased signed the paper in question, he did so without intending that it should operate as a testamentary instrument. In the present case, the whole question will stand over till the trial, for the reason which I have already mentioned. In the meantime I think there is a good deal in what *Dr. Wambey* says, as to the vagueness of the plea in the form, in which it seems hitherto to have been used.

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LISTER AND
OTHERSv.
SMITH AND
OTHERS.

(Before SIR J. P. WILDE and a Common Jury.)

LISTER AND OTHERS v. SMITH AND OTHERS.

*Duly executed Paper, Testamentary on the Face of it.—
Absence of Animus Testandi.—Evidence.*

A duly executed paper, testamentary on the face of it, is not entitled to probate, if it is clearly proved, by parol evidence, that it was executed by the deceased without any intention that it should affect the disposition of his property after death.

The Court of Probate, however, will not hold itself bound by the verdict of a jury to that effect, but will itself weigh the evidence on which such verdict was founded.

In this case the plaintiffs, as executors, propounded a will of Ralph Wheeldon Smith, dated October, 1858, and a codicil thereto, dated 27th of July, 1860. Various parties were cited (s.c. 3 Sw. & Tr. 53).

Mr. Macaulay, Q.C., and Dr. Tristram, for the plaintiffs.

Mr. Hayes, Serjt., and Mr. Hance, for Mrs. Julia Mason, one of the parties cited, applied, with consent of the plaintiffs, to amend the pleadings and record. They had been only within a day or two instructed on behalf of Mrs. Julia Mason, a daughter of deceased and one of the parties cited. It appeared that none of the other defendants intended to interfere; she was interested in having the alleged codicil rejected, and the only question she wished to raise was, whether the codicil of the 27th of July, 1860, which the executors felt themselves bound to bring forward, had been executed by the deceased with the intention that it should operate as a testamentary instrument. They therefore asked to amend the record by adding a plea, that the paper-writing of the 27th of July was not the codicil of the deceased.

*Admitted
17th July
Ought to
3221340*

The amendment having been made, with consent of plaintiff's counsel, the following facts were proved by the documents themselves, and the evidence of Thomas Smith, a brother of the deceased, and a Mr. Green, managing clerk to an attorney.

Julia Mason was a married daughter of the deceased, and she took an interest under the will of October, 1858, as did the other children of the deceased. There was some dispute between Mrs. Marshall, the mother-in-law of Mrs. Mason, and the deceased, as to the title to some house property she had occupied for twenty years, and for which he thought Mrs. Marshall ought to pay him rent. An agreement was drawn up, which the deceased wished Mrs. Marshall to sign, admitting his right to the property; she refused, or, in fact, did not sign it. The deceased desired his brother Thomas Smith to get a conditional codicil made for him, with the view of compelling Mrs. Marshall to give up the house, or to come to his terms.

Mr. Green, to whom Thomas Smith came with the instructions, said:—"The condition, as far as I understood it, was that "if Mrs. Marshall gave up the house, the codicil was not to take effect; and if she refused, then it was not to take effect. I "endeavoured to persuade him not to have the codicil made at "all, as it might happen that the codicil would be in existence "when he died. He said his brother would be very much "disappointed if it were not made, and the notion was per- "sisted in. I prepared it in an absolute form (revoking the "benefit which Mrs. Mason took under the will, the notion "seeming to have been that the Masons, being informed of "the codicil, would use their influence with Mrs. Marshall to "sign the agreement). I saw nothing more of it after I gave "it to Thomas Smith."

Thomas Smith took the codicil, so prepared, to the deceased, who said, "I'll sign it, and put it in your hands to take care of." Before he signed the codicil, Thomas Smith, by his direction,

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1863. wrote to Mrs. Mason. The codicil was read by the deceased
 Dec. 8 & 22. before its execution, and duly signed and attested. Thomas
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 Smith asked him whether, in the event of the agreement not
 being signed or complied with, he intended his daughter Julia
 Mason, and her children, to be deprived of all benefit under
 the will of 1858. Deceased said no, he had no intention to
 alter his will of 1858, but Thomas Smith was to hold the
 codicil with the view of getting a settlement of the rent ques-
 tion. Thomas Smith kept the codicil till compelled to give it
 up by subpœna from the Court. The deceased died on the
 3rd of April, 1861.

The codicil was as follows:—"I, Ralph Wheeldon Smith,
 "of, etc., declare this to be a codicil to my last will, which
 "will bears date the 26th day of October, 1858. I hereby
 "revoke and make void the gift to or in trust for my daughter
 "Julia, the wife of Edwin Mason; and I direct that the
 "moneys thereby given or provided for her shall fall into or
 "form part of my residuary or trust moneys. In all other
 "respects I hereby ratify and confirm my said will."

Mr. Hayes, Serjt., addressed the jury on behalf of Mrs.
 Mason.

Sir J. P. WILDE made the following remarks to the jury
 in summing up:—The facts of the case lie in a very small
 compass, but the question is of great importance. It tends
 to make the wills of any of us very insecure, if a regularly
 executed document, purporting on the face of it to be testa-
 mentary, can be set aside by evidence of the sort you have
 just heard as to the intention of the testator, that such a
 paper should have no testamentary effect; but I think I must
 leave it to you to say whether, upon the evidence, the deceased
 signed the codicil intending it to be an effective instrument,
 or whether he signed it as a mere sham. I must tell you that
 the presumption is that he intended it to be an effective in-

strument, and it is the duty of those who say it was not so intended, to make out that proposition very clearly.

The jury found by their verdict, that the deceased did not sign the paper intending it to have any testamentary operation, and the Court reserved any question as to the effect of this finding of fact upon the codicil and as to costs.

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Dr. Tristram, for the executors, now asked the Court to decree probate of the will only. The executors were satisfied that the testator never intended the codicil to be operative, and therefore considered that by asking for probate of it, they would be attempting to defeat his testamentary intentions. It was executed as a mere sham, and purported to affect real as well as personal property. In support of the motion, he submitted two propositions to the Court:—1. That before the last Wills Act, 1 Vict. c. 26, a sham will or codicil was inoperative in respect of both personal and real estate. 2. That there were no words in the last Wills Act altering the law on this point. There was ample authority that before the Wills Act such a will, whether of real or personal estate, was a mere nullity; it being essential to the validity of every testamentary paper that the deceased, at the time of making it, should have *animus testandi*. *Blackstone*, in treating of a last will and testament, says, “The definition of the old Roman lawyers is much better than their etymology, ‘*voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit*,’ which may be thus rendered, ‘The legal declaration of a man’s intentions which he wills to be performed after his death.’ It is called *sententia* to denote the circumspection and prudence with which it is supposed to be made; it is *voluntatis nostræ sententia* because its efficacy depends on its declaring the testator’s intention.” (1 Stephen’s Com. cap. xx. Devises.) In 2 *Shep. Touch.*, by Prest. 204, it is said, “The second thing required to the making of a good testament is, that he that doth make it have, at the

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1863. "time of making it, *animus testandi*, i. e. a mind to dispose
 Dec. 8 & 22. "a firm resolution and advised determination to make a testa-
 LISTER AND "ment, otherwise the testament will be void. For it is the
 OTHERS "mind, not the words, of the testator that gives life to the
 v. "will; since, if a man rashly, unadvisedly, incidentally,
 SMITH AND "jestingly, or boastingly, and not seriously, writes or says
 OTHERS. "that such a one shall be his executor, or have all his goods,
 "or that he will give to such a one such a thing, this is no
 "will, nor to be regarded. And the mind of the testator
 "herein is to be discovered by circumstances; for if at the
 "time he be sick, or set himself seriously to make his will, or
 "require witnesses to bear witness of it, it shall be deemed in
 "earnest, but if it be by way of discourse only, or of some-
 "what he will do hereafter, or the like, it shall be taken for
 "nothing." The passage at page 14, *Swinburne on Wills*,
 p. 1, s. 3, and *Bac. Abr. 'Wills and Testaments' (C.)*, are to
 the same effect. The form of the common *condidit* used in
 the Prerogative Court in propounding a will before and after
 the Wills Act, is in conformity with these authorities, for it
 alleged that the deceased "having a mind and intention to
 "make and execute his last will and testament," etc. (3 *Burn's*
Ecc. Law, by Phillimore, 196.) The earliest case he could
 discover in point was that of *the co-heirs of Sir W. Rider* (F.
 Moore, 874), referred to in *Com. Dig. 'Devises' (D. 2)*. The
 case as reported in *Moore* is as follows:—"En le Court de
 "Gards inter les co-heires de Sir William Rider fuit declare
 "per Coke, Chiefe Justice del Common Bank, et Tanfield,
 "Chiefe Baron, que si un fait son volunt en escript et dit a
 "donques que il voit ceo alter ou adder a ceo, ceo nest son
 "volunt, quia nest compleat ne publish pur son volunt; mes
 "est deferre et delay tanque le alteration on addition vient a
 "ceo; et si la party morust devant l'alteration ou addition, et
 "sans publication que ceo sera son volunt, cest volunt nest
 "son volunt. Mes s'il fait son volunt et ceo publish, et apres
 "ceo il vient en son ment de alter on adder a ceo mes morust

“devant que il ad fait ascun alteration on addition uncore le
 “primer estoyera pur son volunt.” There are also two cases
 in the Prerogative Court, *Trevelyan v. Trevelyan*, 1 Phill.
 149, *Nichols v. Nichols*, 2 *ibid.* 180. In the former, the
 Court admitted evidence that a testamentary paper was not
 seriously intended to operate, and in the latter refused pro-
 bate of a duly-executed will which the testator had drawn up
 as a specimen of the concise way in which a will might be
 drawn, without intending it should operate. He also cited
Wyndham v. Chetwynd, 1 Burr. 414, to show that devises
 were looked upon as conveyances of land, and that therefore
 the same doctrine which was applied to a deed executed as an
 escrow, might fairly be applied to a will. If such was the law
 before the passing of the last Wills Act, that Act contained
 no words altering it.

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SIR J. P. WILDE: I have referred to the Wills Act, and
 it does not affect the question.

Mr. Hance asked that the defendants' costs might be paid
 out of the estate.

SIR J. P. WILDE: The case has been very well argued by
 Dr. Tristram, and the Court is much indebted to him for the
 authorities which he has collected. It is a most remarkable
 case, and one which, since the trial, has given me some anxiety.

The question raised is whether a certain codicil is or is not
 entitled to probate. It is regularly executed by the testator,
 but evidence was given at the trial that the testator never in-
 tended it seriously to operate as a testamentary document. It
 was proved before the jury that the testator wished one of his
 family to give up a house which she then occupied, and that
 to force her to do so, he made pretence of revoking by codicil
 a bequest which he had made by will in favour of this woman's
 daughter, and that the paper in question was made with that

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sole object; that the testator gave his attorney instructions to prepare it with that intention, and informed him before it was drawn that he never wished it to operate at all. Further, that the attorney pointed out the folly of executing such an instrument, and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator with express directions that he was not to part with it, and that it was in no event to operate, or to revoke the bequest made in his will, but to be used only in the manner above described. Similar declarations were made by the testator at the moment of its execution.

A codicil thus duly executed in point of form, and attested by two witnesses, has been directly impeached by parol testimony. It bears all the appearance on the face of it of a regular testamentary act; but on the evidence it has been found by the jury not to have been intended as such by the testator. The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the Court should turn it into an effective instrument. And such no doubt is the law. There must be the *animus testandi*. In *Nichols v. Nichols*, 2 Phill. 180, the Court refused probate to a will regularly executed, which was proved to have been intended only as a specimen of the brevity of expression of which a will was capable. And in *Trevelyan v. Trevelyan*, 1 Phill. 149, the Court admitted evidence, and entertained the question whether the document was seriously intended or not. In both cases the Court held that evidence was admissible of

the *animus testandi*. And to the same effect is the authority of Swinb. pt. 1, s. 8; and of Shep. Touch. 404. The analogies of the common law point the same way. A deed delivered as an escrow, though regularly executed, is not binding. And in *Pym v. Campbell*, 6 Ell. and Bl., the Queen's Bench held that a regular agreement signed by the party might be avoided by parol evidence that at the time of its signature it was understood that it should not operate unless a certain event happened. There can therefore be no doubt of the result in point of law if the fact is once established. But here I must remark that the Court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury, that their verdict recognises and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance of testimony; sometimes upon written admissions and independent facts proved by disinterested parties, sometimes on conflicting oaths or a nice preponderance of credibility. And it is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the *animus* with which it was made. This weight it becomes the Court to appreciate, and to guard with jealousy the sanction of a solemn act.

In the present case, however, the Court finds the evidence so cogent, that it is prepared to act on the finding of the jury that the codicil was executed as a sham and a pretence, never seriously intended as a paper of testamentary operation. But I am far from saying that the Court will in all cases repudiate a testamentary paper simply because a jury can be induced to find that it was not intended to operate as such. The character and nature of the evidence must be considered, as well as the result at which a jury have arrived, and the Court must be satisfied that it is sufficiently cogent to its end. In this

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1863. case the Court is so satisfied, and it therefore pronounces for
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December 22. CLAYTON v. DAVIS (in the Goods of HENRY HAWKINS,
 deceased).

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 v.
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 (In the Goods
 of HENRY
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Citing to bring in Will.—Lapse of Time.—Costs.

H. died in 1856; his widow proved his Will in 1860, and died in 1862, making D. her executor, and leaving him all her property. C., next of kin of H., cited D. to bring in the probate of H.'s Will. D. propounded it, and C. pleaded thereto. The jury found the issues in favour of D. On the question of costs, the Court

Held, that though C., on the facts proved, might have had reasonable grounds for opposing the probate when taken, yet he had no right to wait till after the widow's death, who might have given important evidence, and then call in the probate, without being liable to costs in case of failure.

In this case, the plaintiff, as the nephew and next of kin of Henry Hawkins, had cited the defendant to bring in the probate of the will of the deceased, and to show cause why it should not be revoked. The deceased died in March, 1856, leaving a will, dated 14th of May, 1855, whereof his widow was appointed sole executrix. She took probate in common form on the 13th of September, 1860, and died on the 29th of March, 1862, leaving a will of the 3rd of August, 1861, of which the defendant was executor. Henry Hawkins, by his will, had left all his property to his widow, and she, by her will, had left all her property to Davis.

The defendant propounded the will, and the plaintiff pleaded, first, that it was not the will of the deceased; secondly, that it was not duly executed; thirdly, incapacity.

Issues joined on these pleas were tried before Sir J. P.

Wilde, by a special jury, on the 5th and 9th of December; 1863.
the jury found a verdict for the defendant on all the issues. December 22.

The Queen's Advocate (Sir R. J. Phillimore) and *Mr. Searle*, for the defendant, moved that the plaintiff should be condemned in the costs. The plaintiff knew that the will had been made within a few days after its execution; but he took no steps to test its validity till after the death of those who could give most important evidence on the matter.

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Mr. Hopwood, contra: The next of kin had a reasonable ground in this case to contest the validity of the will; the chief witness in support of it was the defendant himself, who drew the will and attested it, and there was strong evidence of incapacity before the jury.

SIR J. P. WILDE: In this case, the defendant, Mr. Davis, was cited to bring in the will of Dr. Hawkins, which was proved in common form, in September, 1860, by his widow. Mr. Clayton says the will was obtained at a time when the deceased had no capacity to make a will. Though the plaintiff did not plead undue influence, the course necessarily taken at the trial was to intimate that Mr. Davis and Mrs. Hawkins procured a will from Dr. Hawkins, when they knew he was incapable. The verdict was in favour of the will, and the question now is, whether the defendant should pay his own costs, or whether the plaintiff should be condemned in costs. That depends upon whether Mr. Clayton had reasonable grounds for the course he has pursued. If immediately after Dr. Hawkins's death he had disputed the will, I should not, looking at the evidence produced of the extreme state of illness in which Dr. Hawkins was at the date of it, have condemned him in costs; but he waited till after Mrs. Hawkins's death, who could have given most material evidence, and then drags Mr. Davis into Court to support the will. That is not

1863. the course he ought to have pursued. He says that he did
 December 22. not dispute the will until after the widow's death, because he
 CLAYTON relied on her promise to leave him the property. If he chose
 v. to accept the promise instead of his legal rights, he must take
 DAVIS. the consequences; he must pay the defendant's costs.

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 January 19. *Suit for Revocation of Probate.—Intervener.—Right to begin.*
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In a suit for revocation of probate, the party propounding the Will must begin, though the plaintiff has declared, alleging an intestacy.

Verdict of a jury establishing a Will, although the surviving attesting witness swore that when she subscribed her name the testatrix was dead, upheld on the evidence.

It being doubtful whether the unsuccessful plaintiff in a suit for revocation of probate would be able to pay the costs of an intervener, who had propounded the Will, the Court ordered that the intervener's costs should be paid out of the estate.

A next of kin, who unsuccessfully opposed a Will, was condemned in the costs of another next of kin, whom he had cited to see proceedings, and who had appeared and pleaded, but had taken no other part.

This was a suit, instituted by John Berryhill Cross, the plaintiff, for the purpose of obtaining a revocation of probate of the will of the late Harriet Cross, which had been granted in common form, on the 28th of July, 1840. The plaintiff was a brother of the deceased, and he had cited his other brothers and sisters to see proceedings, one of whom, Alexander Cross, appeared and pleaded. Frederick Richard Thomas

intervened as the assignee of the estate and interest of James Cross, under the will. The pleadings were as follows :—

Declaration by the plaintiff.

That the paper-writing bearing date the 11th of September, 1839, whereof, as being the last will and testament of Harriet (otherwise Harriett) Cross, deceased, probate was, on the 28th of July, 1840, by the Prerogative Court of Canterbury, granted to Hannah Cross, the sister of the said deceased, one of the executors therein named, limited so far as concerned the principal moneys, stocks, etc., and effects which the said deceased and alleged testatrix was entitled to under the will of one Samuel Berryhill, deceased, dated the 23rd of April, 1823, and whereof she had power to dispose, and had, by her said alleged will, disposed accordingly, but no further or otherwise, power having been reserved of making the like grant to the said John Berryhill Cross, the brother of the deceased, and the other executor named in the said alleged last will and testament, when he should apply for the same, and which said probate has been brought into and now remains in the principal registry of this honourable Court, was not executed according to the provisions of 1 Vict. c. 26.

That the name or signature " Harriet Cross " set and subscribed to the said alleged will, was not so set and subscribed by the said Harriet Cross, nor by any other person in the presence of, and by the direction of, the said Harriet Cross.

That the said Harriet Cross died on or about the 16th of September, 1839, intestate, a spinster, without a father, and leaving Mary Cross, her natural and lawful mother and next of kin, and the said John Berryhill Cross, one of her natural and lawful brothers, and one of the persons entitled in distribution to her general personal estate and effects, and also to the said moneys, stocks, funds and securities, dividends, interest, estate, and effects, which the said Harriet Cross was entitled to under the will of the said Samuel Berryhill, deceased, and that the said Mary Cross died on or about the

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18th of September, 1856, without having taken out letters of administration of the personal estate and effects of the said Harriet Cross.

That by reason of the premises the said probate ought to be revoked, and the said alleged will declared null and void, and letters of administration of the personal estate and effects of the said Harriet Cross, granted to the said John Berryhill Cross.

Pleas by Alexander Cross :—1. That the plaintiff caused the paper-writing bearing date 11th of September, 1839, to be proved by the said Hannah Cross, as the last will and testament of Harriet (otherwise Harriett) Cross, deceased, on the 28th of July, 1840. 2. That on the 31st of August, 1840, the plaintiff caused the said Hannah Cross to take out letters of administration of the rest of the goods, chattels, and credits, of the said Harriet (otherwise Harriett) Cross, deceased.

Replications :—1. To first plea, that the plaintiff did not cause the said paper-writing therein mentioned to be proved, by the said Hannah Cross, as the last will and testament of the said Harriet (otherwise Harriett) Cross, deceased, as therein alleged.

2. To first plea, that the plaintiff was induced by the fraud, covin, and misrepresentation of the said Hannah Cross, and in entire ignorance of the facts stated in the declaration, as the grounds for disputing the alleged will, to cause the said paper-writing, in such first plea mentioned, to be proved as the said last will and testament of the said Harriet (otherwise Harriett) Cross, deceased, and not otherwise.

3. To the second plea, that the said plaintiff did not cause the said Hannah Cross to take out letters of administration of the rest of the goods, chattels, and credits of the said Harriet (otherwise Harriett) Cross, as therein alleged.

4. And, for a second replication to the said second plea, that the plaintiff, believing the said paper-writing in such first plea mentioned to be the genuine will of the said Harriet

(otherwise Harriett) Cross, and the same to have been duly executed according to the provisions of the statute in that case made and provided, and being in entire ignorance of the facts stated in the declaration as the grounds for disputing the alleged will, was induced by the fraud, covin, and misrepresentation of the said Hannah Cross, to cause her, the said Hannah Cross, to take out letters of administration of the rest of the goods, chattels, and credits of the said Harriet (otherwise Harriett) Cross, deceased, and not otherwise.

Rejoinder, joining and taking issue on the replication.

Plea by Thomas, the intervener, that the said paper-writing in the declarations mentioned was executed according to the provisions of 1 Vict. c. 26, and that the name and signature "Harriet Cross" set and subscribed to the said will, was so set and subscribed by the said Harriet Cross, or by some other persons, in the presence of and by the direction of the said Harriet Cross, and that the said Harriet Cross did not die intestate.

Replication taking issue.

These issues were tried before Sir J. P. Wilde and a C. J. on 3rd and 4th of December, 1863.

Mr. O'Malley, Q.C., and Dr. Spinks, for the plaintiff.

Dr. Deane, Q.C., and Mr. Serjt. Ballantine, for the defendant, Alexander Cross.

Dr. Wambey and Mr. Searle, for the intervener, Mr. Thomas.

On a question as to which party was to begin,

Sir J. P. WILDE said:—I think counsel for the intervener who propounds the will must begin. Suppose the plaintiff's counsel were to begin and failed to prove what they rely upon, that the will was a forgery, still the main question would be

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1864. undecided, for a failure to prove the will a forgery would not
January 19. establish its validity.

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The cause then proceeded. Counsel for Alexander Cross appeared, but took no part in the trial. The jury by their verdict established the will. The Court pronounced for the will and reserved the question of costs.

Subsequently *Mr. O'Malley*, Q.C., and *Dr. Spinks* with him, moved for a rule for a new trial, on the grounds that the verdict was against the weight of evidence, and upon affidavits referred to in the following judgment, which also disposed of the question of costs.

SIR J. P. WILDE: An application was made in this case to set aside the verdict and order a new trial, on the ground of the verdict being against the evidence, and on affidavits. The result of the evidence was as follows:—The plaintiff, Mr. J. B. Cross, had several brothers and sisters, and among them a sister of the name of Harriett, who was entitled to an annuity of £25 a year, under the will of her uncle, a Mr. Berryhill. Over this annuity she had a power of appointment. This power she exercised by will in favour of her mother, and after her death her three younger brothers, Alexander, Francis, and James. The genuineness of this will of Harriett Cross is the question in this suit. It is dated in September, 1839. The plaintiff, J. B. Cross, and another sister, Hannah, were named executors of this will.

It was very plainly made out, contrary to the reiterated statements on oath of the plaintiff, that he, the plaintiff, had from the first accepted this will as genuine. He had it in his possession after his sister Harriett's death, gave instructions to the proctor for proving it, and paid the costs of doing so. The probate was only taken, however, in the name of his sister Hannah as executrix. This woman appears to have absconded upon certain proceedings being taken in Chancery

to compel her to account for the funds in her hands. In 1859, the plaintiff told James Cross, who had been abroad, that his sister Harriett had made a will, and left him, James Cross, one-third of the property, over which she had the power of disposal. The plaintiff then accompanied James Cross to the office of Mr. Thomas, an attorney, who is the intervener in this cause, and the two brothers instructed Mr. Thomas to file a bill to compel the payment of James Cross's share under the will in question. The result of this was, that the fund was paid into court, and a small sum on account actually received by James Cross. Other proceedings were at this time conducted by Mr. Thomas on James Cross's behalf, and a considerable amount of costs incurred. Mr. Thomas had also advanced £145 to James Cross in cash. In February, 1861, James Cross executed a mortgage to Mr. Thomas to cover these claims, by which he transferred his share of the property bequeathed under the will in question, and so Mr. Thomas became interested in the genuineness of the will. Shortly after this mortgage, as Mr. Thomas believes, but long after the proceedings taken in Chancery, as he positively swears, Mr. Thomas was, for the first time, informed by the two brothers that the will of Harriett Cross was a forgery. When did they first know it to be so? John Berryhill Cross swears that he knew it for certain in 1841, when he went to Doctors' Commons and saw the original. James Cross swears he knew it before he went to Mr. Thomas at all, and that John Berryhill Cross told him so. And yet Mr. Thomas swears that they both "treated it as genuine when they induced him to file a bill to enforce it;" and the letter of John Berryhill Cross, forwarding the copy will for Mr. Thomas's use when they gave him his instructions, threw no doubt on its genuineness. But a more cogent document still was put in evidence to show that this story of the two brothers, that they treated the will as a forgery in 1859, is a scandalous falsehood. I refer to a paper of instructions written by James

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Cross and handed to Mr. Thomas in 1859, in which the following passage occurs:—"16th October, 1859. I returned " to London and was informed for the first time for a fact, by " my brother John Berryhill Cross, that my sister had executed " a will before her death, leaving me one-third of her property, " and that Hannah Cross had, at her own request, been appointed trustee, and had duly proved the same at Doctors' Commons." James Cross having thus parted with all interest under the will, and Francis Cross being dead, the plaintiff, Mr. John Berryhill Cross, took steps in this Court some time since to call in the probate of the will and revoke it.

The conduct of Alexander Cross, the surviving appointee under the will, who has at last appeared and pleaded in this suit, but not in affirmation of the will, shows that the plaintiff had little opposition to fear in that quarter; and accordingly the Court was applied to twice on motion to revoke the probate. It does not appear that either of the two brothers gave any notice to Mr. Thomas of the steps which were being taken behind his back. The late Sir Cresswell Cresswell, however, refused these applications, and the result has been that Mr. Thomas has had the opportunity of intervening, and is the sole party now supporting the will. If the will is set aside, the sum in Court, upwards of £800, will be divisible among the Cross family, brothers and sisters. A will thus proved twenty years ago, acted upon at the time as genuine by the plaintiff who now impeaches it, and finally acted upon by both the plaintiff and James Cross, by seeking to enforce its provisions in Chancery long after the time when they both now swear that they first knew it was a forgery, would certainly require very strong evidence to set it aside.

Now what was the evidence? The will is produced, and appears to be regularly signed and witnessed with a proper attestation clause. The attesting witnesses are Mary Cross and Louisa Cross. Louisa Cross is dead; Mary Cross, the plaintiff's sister, comes as a witness, and tells this extraordinary

story—that she did put her name there; that Harriett (the supposed testatrix) was dead when she did so, and that John Berryhill Cross made her do it, not telling her what the document was; that John Berryhill Cross and her sister Hannah were the only persons present, and that she never had an idea, until upwards of ten years afterwards, when she received an anonymous letter, that she had put her name to a forged will. But she proved the signature of Louisa Cross, the other attesting witness, to be genuine, and said she thought, but could not swear, that the signature of Harriett Cross, the testatrix, was genuine also. Was Mary Cross's account to be believed? If it was, John Berryhill Cross was guilty of forgery. But the first witness for the plaintiff was John Berryhill Cross himself, who totally denied Mary Cross's story. What were the jury to think, and what was the probable explanation? It seems possible that Mary Cross, in the description she gave of the occasion and circumstances when she put her name to a paper by John Berryhill Cross's desire, was unconsciously referring to some other paper than the will now in question. This seems possible, for the event was twenty years ago; she did not profess to a very accurate recollection, and she did not see the contents of the paper she spoke of signing, nor was she aware of its nature. Moreover, John Berryhill Cross was not asked by his learned counsel whether he had ever acted as Mary Cross described in reference to any other paper with which the will might possibly have been confounded. This is one supposition, and probably the only one upon which both witnesses can be acquitted of wilful perjury.

Again, it may be that the jury believed John Berryhill Cross, that he was not guilty of forgery, and being unable to reconcile Mary Cross's testimony with that of her brother, disbelieved the whole story she told. It may be that they were inclined to give more faith to the genuine signatures of the two attesting witnesses, and the language of the attesta-

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tion clause, than to a wicked story, which, if true at all, did no less than charge a respectable man, the brother of the witness, with the crime of forgery. But, above all, the jury may have been pressed by the consideration that the persons who alone could have forged this will, if forged it was, were persons who took no interest under it. Hannah Cross, in whose hand it is throughout, took nothing under it; and John Berryhill Cross, who is charged with assisting her, took no interest either, nor did Mary Cross, nor Louisa Cross. In fact, the interest of all these brothers and sisters is the other way. In some considerations, such as these, I think I can see good reason for the verdict the jury have found. Certainly I cannot see that they have been in error, or that the verdict is against the evidence.

The rule was moved also on affidavits, part of which went to show that John Berryhill Cross could not, as appears by his diary, have been at Cheshunt (where Mary Cross swore she witnessed the will) on the day in question. This only proves Mary Cross either mistaken or false, and she is the chief witness in support of the plaintiff's case. The rest of the affidavits bring forward additional evidence as to the handwriting of Harriett Cross, the testatrix. There is no reason, that I am aware of, why this evidence should not have been produced at the trial. But whether this be so or not, it is contrary to all practice to grant a new trial for the purpose of adducing additional evidence upon the known point of contest in the suit. The rule must, therefore, be refused.

With respect to costs, it is clear Mr. Thomas must have his costs, either from the estate or from John Berryhill Cross, the plaintiff. He asks for the former, and as it may be doubtful whether he could get them from the plaintiff, his application is granted. Mr. Alexander Cross was cited and brought into court by the plaintiff, who has not only failed in his suit, but has so acted in the matter as not to entitle him-

self to any relief from the ordinary consequences of failure. 1864.
The Court, therefore, condemns the plaintiff in the costs of January 19.
Mr. Alexander Cross.

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CROSS AND
OTHERS
(Thomas
intervening).

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Proof of lost Will by Parol.—Nature of Evidence.—Brown v. WHARRAM
Brown, 8 Ell. & Bl., considered.—Wills Act. v. WHARRAM.

Where probate has been asked of the substance of a lost will, as contained in the parol evidence of witnesses, the Court has never acted but on the fullest and most stringent proof. Where, six or seven years after the death of the alleged testator, the substance of a will was offered for probate as contained in the testimony of the widow, solely interested under the alleged document, her niece, and an attorney's clerk connected by marriage with the widow, the document after execution having been alleged to be in the custody of the latter, but not being forthcoming, the Court held that there was not sufficient proof for it to act upon; but intimated that, if it had thought otherwise, it would have required an argument on the legality of giving effect to a will proved by parol evidence since the Wills Act. Quære, whether, in *Brown v. Brown*, and other cases decided since the Wills Act, the attention of the Court has been sufficiently called to the operation of that statute in this respect.

In this case the widow of the deceased had propounded the alleged will of the deceased under the circumstances sufficiently noticed in the judgment. A son of the deceased appeared in person and opposed the will.

Mr. S. A. Hill conducted the case for the plaintiff.
The defendant appeared in person. *Cur. adv. vult.*

SIR J. P. WILDE: In this case probate is sought for the

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will of Matthew Wharram, as contained in the depositions of certain witnesses. The deceased died in March, 1857, and the proof of the will of which probate is now sought is contained in the evidence of his widow, her niece, and an attorney's clerk connected with Mrs. Wharram by marriage.

It is stated that a week before his death the deceased desired Mr. Milner to prepare a will giving all his property to his wife absolutely ; that Mr. Milner did so ; that it was duly executed in the presence of the niece and Mr. Milner, who signed it as witnesses, and that Mr. Milner took it away with him. This latter fact is deposed to by the widow and niece, but Milner does not recollect it. The widow further proved that she was continually afterwards with her husband till he died, and that he did not destroy or revoke it. At his death no attempt was made to prove the will, by reason, it is said, of the property being so small. An unexpected accession to it has lately put the widow upon proving it, but it cannot now be found. No draft of it is in existence, and no document that throws light on its existence or contents. Between six and seven years have elapsed since the death, and the entire proof rests on the parol evidence of three witnesses, one of whom is entirely interested in establishing the will, and neither of the others so situated as to be entirely without bias or prejudice in the matter. But all swore to the will and its contents, and it was treated at the hearing as established doctrine that a will so proved was entitled to probate as a matter of course ; and I do not say that, on reviewing the cases, there is not some colour for advancing such a proposition ; but some reflection on the subject has given rise to grave doubts in my mind, and opened up some questions of sufficient importance to the community.

Is it competent in all cases to parties, however interested, to claim probate of a will which exists only in parol testimony ? May this be done at any time, however remote from the death of the supposed testator ? Is the character and

cause of the loss of the document wholly immaterial? Does the fact that the party chiefly interested in seeking probate destroyed the will himself, voluntarily, or ignorantly, or carelessly, make any difference? and if so, would this difference extend to careless custody, by which this loss was brought about?

These questions are forced upon the Court by the perusal of a case, decided in the Queen's Bench, of *Brown v. Brown*, 8 Ell. & B. 886. In that case a supposed lost will relating to real property was placed on the footing of any other lost document, the loss proved as that of a receipt or letter would have been, and secondary evidence of its contents admitted as a matter of course. If this be a sound principle, the consequences are no less obvious than momentous. The existence of a will, in its due execution and its subsequent loss, must indeed be proved, but proved by parol only, and no corroboration required. Furthermore, its contents may be proved from memory. Property, however large, real or personal, may thus be disposed of, in a direction however strange, by the unsupported oath of a single witness. Upon such a system it would be difficult to exclude either fraud or mistake. Fraud—for by as much as false swearing is more easy to perpetrate and more difficult to detect and expose than forgery, by so much are the safeguards which belong to a written will, and the visible signature of the testator and witnesses, weakened or withdrawn. Mistake—for as the same parol evidence which sufficed for the authenticity of a will is held competent to supply its contents, the certainty of writing is replaced by the frailty of memory.

But the danger has a wider range, for the same evidence that may set up a false will may practically revoke a true one. The witness has only to give the former a date subsequent to that of the latter, and insert a clause of revocation, and the evidence, if believed, destroys the first will, however solemnly executed or carefully preserved. A man may thus die with a

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perfectly executed will in his pocket, and the Court or a jury on the oath of a single witness may yet declare him intestate. And this is what actually happened in the above case of *Brown v. Brown*. A will perfectly executed was found in the dead man's pocket, and it was set aside by proof of a second will, which was not to be found, and the existence of which was proved by the oath of one witness only; no draft or copy of it produced, and the contents proved from memory by the same witness. The Court ruled that the second will revoked the first, and that the second was itself destroyed by the deceased, as it was in his custody, and not found at his death. The result was an intestacy, and real property to the value of £40,000 passed to the heir-at-law. The danger of such reliance on parol was forcibly commented upon by the Court in *Cutto v. Gilbert*, 9 Moore P. C. :—" And so far we concur " in the opinion which has been expressed by very learned " persons, that to revoke an existing instrument by parol evi- " dence that another will has been executed, and by such " evidence alone, though the law may admit of that course of " proceeding, yet it is one attended with danger, and conse- " quently the oral evidence produced must be strong and con- " clusive."

Now, in all this I venture to doubt if the operation of the statutes relating to wills has been sufficiently considered. To what end, it may be asked, does the Wills Act of 1857 declare that "no will shall be valid" unless it be in writing and signed by the testator in the presence of witnesses, and signed by them in the presence of the testator, if a parol oath and the fiction of a loss can make a will valid without any writing at all? True, the carefully enforced method of execution created by the statute is of some avail to secure a solemn and deliberate act in place of a hasty expression of testamentary desire; but has it no further object? Was not this writing itself, and the triple signatures with the detailed requirements as to position on the paper intended also, as living witnesses,

to bear visible testimony to the reality of the act and the exact disposition of the property which they were designed to attest? And if so, can the Court dispense with the paper and writing altogether? These matters were not adverted to in the above case, nor was the attention of the Court directed to them in argument. I persuade myself they are worthy of consideration.

Some parallel to the Wills Act may be found in the Statute of Frauds, which, in like manner, enforces writing as requisite to the validity of certain contracts. Has it ever been solemnly decided that a man may recover on a contract within the statute on parol proof that the requisite contract had been signed, but was lost? A very learned judge (the late Baron Alderson), in *The Attorney-General v. Sitwell*, 1 Y. & C., observes that, "to reform a written contract by parol, and "then enforce it, would be virtually to repeal the Statute of "Frauds." Would the substitution of parol evidence for writing in the whole contract be less so? I do not propose to reason out this question, still less to decide it. Before long it may be necessary to do so. Meanwhile the authorities of the Ecclesiastical Court, which are those of this Court also, do not, I think, enforce a decision based on such dangerous ground. They are not numerous, and most of them before the Wills Act of 1837. In *Foster v. Foster*, 1 Add. 462, a will had been seen and read after the death. It was torn up; the fragments were put together as far as could be, and the rest made up from the context and memory. In *Martin v. Lakin*, 1 Hagg. 245, a will in favour of a child was destroyed by the widow, the draft was proved, and the widow admitted its existence and destruction. In *Knight v. Cook*, 1 Lee, 413, a will was torn up after death, and the scraps were pasted successfully together. In *Davis v. Davis*, 2 Add. 227, the Court was satisfied of the contents of the will, and that it was not revoked. The deceased had kept it in a box, where an independent witness had seen and read it. At the death it was

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1864. not forthcoming. There are two further authorities in 2
 March 22. Notes Cases, 105, and 6 Notes Cases, 528, to the like effect.
 WHARRAM To these must be added the case of *Trevelyan v. Trevelyan*, 1
 *. Phill. 152, in which a will was destroyed by the person in
 WHARRAM. whose custody it was, under the idea that it had been executed
 in jest; but the testator was proved to have spoken of it up to
 his death as his will. In all these cases probate was granted,
 and the like has been done twice at least by Sir Cresswell
 Cresswell since the establishment of this Court, but in both
 cases on the authority of *Brown v. Brown*, in the Queen's
 Bench, above cited.

Now, here I must observe two things: first, that the current of authority appears to have flowed on past the period of the Wills Act without any notice of that enactment, certainly without serious argument upon its effect in this regard; and, secondly, that the cases themselves were in their facts and sources of evidences such as to entirely satisfy the Court. On the other hand, in *Huble v. Clark*, 1 Hagg. 118, Sir John Nicholl refused probate, though the existence and contents of the will were proved by two witnesses, saying that as the will was alleged to have been purposely destroyed after the death, the Court would require "the most stringent evidence" to establish it.

The result of these authorities is, that this Court has been in the habit, without notice of the Wills Act, or any reference to its provisions, of allowing wills to be proved by parol only. But it has done so in cases fairly free from doubt or suspicion. From this course of practice the Court does not propose in the present case to depart. But at any rate, since the Wills Act, the parol evidence that should be permitted to stand in the place of a written will ought to be of a very cogent character. The Court ought not, I think, to act on less proof than the Court of Chancery has always required, when asked to rectify mistakes in written contracts, and then replace written evidence by parol. In *Henkle v. Royal Exchange*, 1

Ves. sen. 318, the Lord Chancellor, speaking of such proof, said, "to come at that it is certain there ought to be the "strongest proof possible." And again, in *Inchiquin v. Inchiquin*, 1 Brown, 341, I find it said, "to be sure it must be "strong irrefragable evidence." And again in *Lord Townsend v. Stangroom*, 6 Ves. 338, "proper irrefragable evidence" are the expressions used.

Is the evidence in this case of that character? If it were, I should desire that the effect of the Wills Act should be fully argued and considered. But I cannot think it is so. The long delay in applying for probate, the total absence of testimony as to the manner or cause of the loss, the custody of the document, which was that of the agent of the person chiefly interested, the interest of one witness and the natural leanings of the two others, all conspire to infuse doubt when a tolerable certainty ought to prevail, and under these circumstances the Court must refuse the grant.

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In the Goods of WILLIAM KENNETT LOFTUS, deceased.

Administration.—Renunciation by A. and B. as Executors and Residuary Legatees in Trust, but not as Testamentary Guardians on certain Contingencies.—Grant to A. and B. as Testamentary Guardians.—R. 50 of Non-Contentious Rules for Principal Registry.

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A. and B. being appointed executors and residuary legatees in trust, and also guardians of the children of the testator on the death or second marriage of his widow, renounced their right to a grant as executors and residuary legatees in trust, but not as testamentary guardians of the children, who were beneficial residuary legatees substituted, and a grant of administration (with Will annexed) was made to the widow, as beneficial residuary legatee for life. The

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widow died, leaving part of the estate unadministered, and five children by the testator, all minors. The Court made a grant of administration (with Will annexed) to A. and B. as testamentary guardians of the children, the beneficial residuary legatees of the testator. The 50th rule of the Rules for the Principal Registry in Non-Contentious Business, which directs that no person who renounces probate or letters of administration in one character, is to be allowed to take representation to the deceased in another character, is for the guidance of the registry, but capable of modification by the Court. The Court declined to depart from the practice of limiting the grant to the guardians until one of the minors should attain his majority, by the addition, "until he should apply for and obtain the grant."

William Kennett Loftus, late of Newcastle-upon-Tyne, died on the 27th of November, 1858, leaving a will dated the 19th of September, 1853, wherein he appointed his friends, Edward Mather and John Gray, his executors and residuary legatees in trust. He thereby also appointed his wife, Charlotte Loftus, guardian of his children during life or widowhood, and on her death or second marriage he appointed the said E. Mather and J. Gray guardians. He gave his residuary estate to his wife for life, and after her death directed it to be equally divided amongst her children. On the 1st of April, 1859, his widow, as beneficial residuary legatee for life, obtained a grant of administration with the will annexed, the said E. Mather and John Gray having renounced their right as executors to probate, and as residuary legatees in trust to letters of administration with the will annexed, but without renouncing their right to letters of administration with the will annexed as testamentary guardians of the children on the death or second marriage of the widow. The widow died on the 10th of December, 1862, without having re-married, leaving part of the personal estate of the deceased unadministered, and five children by the deceased, the eldest, a son, being now of the age of eighteen years.

It appeared by the affidavits that the principal part of the unadministered estate of the deceased consisted of his lease-

hold interest in the Newcastle Race Stand, which was mortgaged, and which had, in 1849, been assigned by him to the said E. Mather and J. Gray and another in trust for certain annuities, the interest on the mortgage, and certain debts; that, from the nature of the property, it was essential for its protection that it should be managed by some one who was on the spot for some time previous to and during the Newcastle races, which took place in the month of June in each year; and that as the eldest son was at sea, and might be absent at the time when he came of age, it was expedient that the grant should not be made to the guardians in the usual form until one of the minors shall attain the age of twenty-one years.

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Dr. Tristram moved the Court to decree letters of administration of the unadministered personal estate of the testator, with his will annexed, to be granted to E. Mather and J. Gray as the testamentary guardians of the testator's children, the beneficial residuary legatees, for their use and benefit during minority, until such time as one or more of them should attain the age of twenty-one years, and should apply for and obtain a grant of administration to the unadministered estate of the testator, with his will annexed. There are two questions in the case: first, whether Mather and Gray, having renounced probate and also letters of administration with the will annexed as residuary legatees in trust, are thereby precluded from now taking administration with the will annexed, as guardians; secondly, if they are not so precluded, whether the grant to them can be made in the form asked. (1) When Mather and Gray, in 1859, renounced probate, and also, as residuary legatees in trust, letters of administration with the will annexed, they were not precluded by the renunciation from afterwards asking for administration as guardians of the children, as they did not then hold the character of guardians. *In the Goods of Morrison* (2 Swab. & Trist.

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129). By the 50th rule of the Rules for the Registrars of the Principal Registry in Non-Contentious Business, "no person "who renounces probate of a will or letters of administration "of the personal estate and effects of a deceased person in "one character, is to be allowed to take a representation to "the deceased in another character." But that rule did not come into operation until the 1st of September, 1862, and cannot apply to renunciations previously made. (2) As to the form of the grant: according to the usual practice, the grant would cease upon one of the children attaining the age of twenty-one years; but in this case the nature of the property, and the possibility that the eldest child may be at sea when he attains his majority, make it desirable that the grant should continue until one of the children should take out administration, if the Court has power to make the grant in that form. The decision in *the Goods of Cassidy* (4 Hagg. Ec. 360) shows that the Court may alter the usual form of the grant. Until that decision, a grant to an attorney for the use and benefit of an executor or party entitled to administration then abroad, was limited *durante absentia*, and determined upon the principal coming to this country. Great inconvenience frequently resulted from this practice, as third parties, having no means of knowing when the grant expired, might deal with the attorney at a time when his authority had expired; and Sir J. Nicholl directed that for the future, in such cases, the grant should be limited until the persons for whose use the grant was made should duly apply for and obtain probate or administration. If the form of grant was altered in that case on the ground of convenience, so might it be in the present case.

Cur. adv. vult.

Sir J. P. WILDE: In this case an application was made for a grant of letters of administration with the will annexed, *de bonis non*. The persons applying for the grant were two gentlemen who had been by the will appointed

guardians of the infant children of the testator after the death of his widow. They were also appointed executors and residuary legatees in trust. On application for the grant, a difficulty was felt in consequence of rule 50 of "The Rules, Orders, and Instructions for the Registrars of the Principal Registry in Non-Contentious Business." It is no doubt most important that the rules of the Court should be strictly adhered to, but it is still more important that the Court should facilitate, as much as it can, the administration of estates in a manner beneficial to the parties entitled to them. If, however, there had been a rule of practice binding on the Court, notwithstanding the benefit to be derived from a departure from it in a particular case, it would be necessary to adhere to it. But on turning to the rule, I find it is one of a class of rules which has this general heading, "General Rules and Orders for the Registrars of the Principal Registry." On inquiry as to the reason for making rule 50, I find that it was directed to a class of cases wholly different from the present. I think it is competent for the Court to treat the rule as intended for the general guidance of the business in the registry, and capable of modification by the Court, if sufficient reason be shown for departure from it. In this case it would be extremely unjust to apply the rule in its stringency; for the persons who renounced did not, at the time of renouncing, hold the character of guardians; and they might never hold it. They renounced during the life of the widow. It seems to me it is extremely reasonable to make the grant to them. I shall therefore grant that part of the application. But I was asked to do something more, and to order that the grant might be extended beyond the time of the eldest of the infant children attaining his majority. This part of the application is contrary to the usual practice of the Court, and cannot be acceded to.

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CASES
IN THE
COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

1863.

November 18.

E—
 v.
 T—
 (falsely called
 E—).

E— v. T— (falsely called E—).

Suit for Nullity.—Malformation.—Delay.

Where a delay of some years occurs in bringing a suit of this nature, the Court will require an explanation of such delay.

This was a petition for a decree of nullity of marriage by reason of the incurable malformation of the woman, which fact, on the medical evidence, was clearly established; but the Court, advertent to the delay of more than ten years from the date of the marriage to the commencement of the suit, required some explanation of it.

The parties had lived in Devonshire, and one of the medical men who had reported to the Court and gave evidence in Court, had been her regular medical attendant before and after marriage. It appeared that some time after marriage she had undergone an operation at Bristol.

Dr. Spinks, who conducted the petitioner's case, then called the petitioner, Charles Henry E—, who deposed in substance as follows:—I was married in 1851; the morning after the

marriage I took the respondent to Mr. Griffiths, a surgeon, in Gower Street; he examined her, said it was a curious case, and should advise a further opinion; he named Dr. Reed; I went with her and Mr. Griffiths to Dr. Reed; he examined her, and told me he thought an operation might be successful; she appeared so nervous and excited that he advised her going home for the present; he prescribed some medicines, and said I had better bring her up again in the course of a few months; on her return home she became exceedingly ill, and so remained for the most part till we separated; her state of weakness was so extreme that she was hardly able to dress herself; after the operation at Bristol she came back home, and relapsed into the same weak nervous state; it was impossible for me then to bring her to London; when the rail opened she came to London, and was operated upon by Mr. Baker Brown, in August, 1860; she was in London two or three months, and was very much upset by the operation; soon after her return I told her mother that, as nothing could be hoped from surgical operation, I thought it my duty to separate; she agreed, but said that, as her daughter's health was so bad, if I would let the matter remain for a time, she would acquaint her daughter that I wished for a separation; I expected every week she would have done so, but she did not; in September, 1862, the respondent was stopping with a friend, and my sister told her she thought she ought to separate; she never came back after that.

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(falsely called
E—).

THE JUDGE ORDINARY: In this case I think the main fact is proved, but a delay of eleven years before the Court was applied to required to be explained. The principle which guides this Court is, that persons seeking such relief ought to come without marked delay; that is, the Court interferes to relieve the petitioner from a real grievance, and the presumption is, that if the alleged grievance is borne with for a long time, the application is not *bonâ fide*, but is made for

1863. some side purpose. Had it not been for the evidence of the
 November 18. petitioner, the length of time would, in my mind, have been a
 E— bar ; but his evidence satisfactorily explained the delay. There
 v. is no doubt that the woman was in a very feeble state of
 T— health. He behaved in a most manly and considerate way,
 (falsely called and was not without a hope, on which he acted, that surgical
 E—). remedies would alter her state. In this he was disappointed.
 Her ill-health continued, and in 1860 he ascertained that no-
 thing was to be obtained from surgical aid or the operations
 of nature. I see no ground to draw, from the lapse of time,
 the conclusion that the petitioner is seeking relief on other
 than the true ground, and the only one on which this Court
 could give it. I accordingly pronounce the decree of nullity
 prayed for.

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HUDSON v. HUDSON.

*Wife's Petition for Judicial Separation.—Adultery and
 Cruelty.—Evidence.—Practice.—Legal Cruelty.*

The wife petitioned for judicial separation, alleging cruelty and adultery, which the husband's answer traversed. The cause came on before the Court itself, and on objection taken to the admissibility of the petitioner's evidence as to cruelty, the Court ruled that on the issues as they stood it was inadmissible, but struck out the issue of adultery as an immaterial issue, the counsel for the husband not objecting.

The Court will not grant a decree of judicial separation to protect the wife from mere unhappiness resulting from an ill-assorted marriage, nor from the destruction of domestic comfort caused by drunkenness.

This was the wife's petition for judicial separation. The petition alleged various acts of cruelty, and a charge of adul-

tery with some woman, unknown to the petitioner, in May, 1859. The husband appeared, and traversed these charges. The case now came on for hearing before the Judge Ordinary.

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Mr. M. Chambers, Q.C., and *Dr. Swabey*, for the petitioner.

Dr. Spinks for the respondent.

Mr. M. Chambers, having stated the petitioner's case as to cruelty, proceeded to call her as a witness.

Dr. Spinks objected. There is an allegation of adultery in this petition which is traversed, and the citation calls on the respondent to answer a charge of adultery; it is therefore a suit by reason of adultery within the meaning of the 4th section of the 14 & 15 Vict. c. 99, which excludes the parties "to any proceedings instituted in consequence of adultery" from being witnesses. *Pyne v. Pyne*, 1 Sw. & Tr. 178. The 22 & 23 Vict. c. 61, s. 6, only applies to the wife's petition for dissolution of marriage.

Mr. M. Chambers submitted that, as the petitioner could obtain the prayer of her petition on proof of the cruelty alone, on which she was a competent witness, the Court would hear her as to that on the present state of the pleadings, or it would treat the issue of adultery as immaterial, and strike it out.

THE JUDGE ORDINARY: I cannot think that there is any doubt as to the law applicable to the case as it now stands. The petitioner falls within the exception of the 14 & 15 Vict. c. 99, which generally enables the parties to a suit to give evidence. But the real question, from the counsel's opening of the case, seems to be one of cruelty, though the citation and one paragraph of the petition charges adultery. If there

1863. is nothing in the practice of the Court which forbids it, I
November 12. think the issue of adultery ought to be struck out, and the
case proceeded with as one of cruelty only, when the wife's
evidence will be admissible. If necessary, the alteration must
be taken into consideration on taxation of costs.

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Dr. Spinks, on the part of the husband, admitted that this was the proper course to take under the circumstances of the present case.

The case then went on as one of cruelty, the wife and husband, and other witnesses on their respective sides, were examined, and the Court took time to consider its judgment, which it delivered on a subsequent day, as follows:—

THE JUDGE ORDINARY: This is a suit promoted by the wife for a judicial separation from her husband on the ground of cruelty. She was married in 1854, and after eight years passed in cohabitation with him at a farm which he occupied, she withdrew herself from his house upon a false pretence in the month of October, 1862, taking with her their only child. No particular event of a violent character immediately preceded her departure. She left on a visit to which she had obtained her husband's sanction, with a promise of speedy return; her husband accompanied her part of the way, both walking and driving; they kissed at parting, and separated on apparently good terms. She never came back. An attempt has been made to connect her departure with the fact, that he had two men to sup with him (a labourer and a poultry-dealer), with whom, as a farmer's wife, she thought it unbecoming to consort. Ridiculous as an act of legal cruelty, there is a hopeless variance between the date of this event and her departure, and the suggestion wholly failed. Upon the review of her married life which she has placed before the Court, supported by two or three witnesses, who evidently

sympathized with her, it is impossible not to see that she may have suffered much, both from weak health and distress of mind, and that these sufferings have been to some extent caused, at any rate increased, by her husband's conduct. But it needs not be told to those who are familiar with the law which it is the province of this Court to administer, that a wife who seeks to withdraw from the consortism of married life must prove much more than that. I forbear to add another to the numerous attempts to define legal cruelty, which are the work of abler hands than mine. Perhaps exact definition is to be distrusted where all lies in degree and circumstance. Certainly great precision in the rule serves only to beget great laxity in its application. But one feature stands prominent in most, if not all of the decided cases. Personal violence, or the threat of it, and danger to health or life as the result of it. Of the very aggravated cases, if they exist, in which the Court might, according to some dicta, be induced to act on less, it is enough to say that the present is not one. Now, the burthen of Mrs. Hudson's complaint is, that her husband was much given to intoxication; that he was apt to be, on slight provocation, rough and coarse in his language to her at most times, and very violent and abusive to her at some; though of violence to her person she herself gave but two instances, to which I will presently advert. She has convinced the Court that this account of her husband's demeanour is in the main correct. But the Court enjoys the inestimable advantage of seeing and hearing the two parties themselves in these matrimonial disputes. It is this which gives life, force, and colour to the history which falls from their lips; the dry record of hasty words or ungracious speech, a menace used here, or a bad name there, goes for little in the just estimation of a quarrel or the measure of mutual blame. Nay, the true import of the language used must often be sought not in the words themselves, but in the character and demeanour of the speaker. Reading by this light, the Court

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can discover no such danger to her safety, nor even such intolerable hardship in her life, as the petitioner would fain represent. Nor is it led to conclude that the threats and violent language which at times broke from the respondent really portended, or impressed his wife with the fear of any actual danger to her person. If her husband was a bold, rough, and somewhat reckless man, given to sudden outbreaks, and using, when under excitement, strong and unbecoming language, he was, at the same time, neither implacable nor vindictive, and there is a special absence of evidence to show any want of that manly spirit which is the sure safeguard of the weaker sex. There is evidence, no doubt, of hasty suspicion, and ridiculous charges of impropriety, on occasions when he found his wife alone with other men. But the blame was not wholly his, for his wife knew his feelings on such subjects, and did not conform to them. And Mr. Underhill, whose presence brought about the most serious outbreak of which we have any account, had been expressly forbidden the house. It is unnecessary to pursue these matters further. I will glance at the personal violence imputed. There is a great variance between the statements of the petition and the proof. Recurring to Mrs. Hudson's own evidence, I find two acts of violence imputed. She says he threw a bowl of water over her and her maid; and he admits that he did. If her account and that of her maid is taken (though they by no means correspond), it was done without any provocation. If his account is taken, she had very little to complain of. I believe his account; but if I did not, it is difficult to pronounce such an act legal cruelty. But she also swore to a much more serious charge; she declares that on one occasion he upset her, the child, and himself out of a carriage, and that he did this on purpose. She was much bruised and injured on this occasion, and if she could establish the wilful intent which she imputes, it would, no doubt, be an instance of cruelty. But her husband gives a

very different account. He says, it was an accident; that it took place at ten o'clock at night, in January; that it occurred in going down a very steep hill, and at a spot where the road was very unsound. Finally, that it was raining, and that his wife held an umbrella before his face. I have no hesitation in pronouncing that I believe his account of the matter, and give full credence to him in his assertion, that "he was not likely to imperil willingly the safety of his little child," to whom he was much attached. I pass over what remains of the imputed cruelty, because it is to be found only in the evidence of other witnesses, and not being vouched by the wife herself, the Court naturally leans to the denials which it has received from the husband. In these circumstances the Court can offer Mrs. Hudson no relief from the obligation of her marriage vow. The law is not responsible for her choice, and the Court cannot assist her to recede from it. It cannot be too widely known that this Court has neither the power nor the inclination to deal with the mere unhappiness of ill-assorted marriages, or the destruction of domestic comfort by the detestable vice of drinking. And if Mrs. Hudson thus suffers, she will do well to seek such remedies as may be found in the force of the natural affections and domestic ties, for it will now be her duty to return to her husband, whom she left without warrant, and with whom she bound herself by her marriage oath to live.

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Verdict of Jury on Cruelty.—Principles of Court in granting or refusing New Trial.

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Where the issue of cruelty is submitted to a jury, the Court will not grant a new trial unless it is satisfied that there was error or mis-

1863. carriage on the part of the jury. That, on the evidence, the Court
 Nov. 6 and 12. might not with certainty have arrived at the same conclusion as the
 jury did, is not sufficient.
 SCOTT That the party asking for a new trial could produce corroborate evi-
 v. dence not produced, or not in his possession at the first trial, is no
 SCOTT. ground for granting a new trial.

This was originally a suit for restitution of conjugal rights by the husband against the wife, who pleaded cruelty, and prayed for a judicial separation. The petitioner took issue on the cruelty.

The issue was tried by a special jury before the vacation, when the jury, by their verdict, negatived the wife's plea of cruelty.

The Queen's Advocate (Sir R. J. Phillimore), *Dr. Spinks* and *Mr. H. T. Cole* with him, now moved for a rule *nisi* for a new trial, on the ground, mainly, that the verdict was against the weight of evidence. *Cur. adv. vult.*

- November 12. THE JUDGE ORDINARY: The Court is asked in this case to grant a rule *nisi* for a new trial. It is a suit by the husband against his wife for a restitution of conjugal rights. Her answer is, that he has been guilty of conduct amounting to legal cruelty. Whether he had or not was the single question of fact in the suit, and was accordingly tried before the late Sir C. Cresswell and a special jury. The jury found that he had not. This finding I am now asked to set aside, on the ground that the verdict was against the weight of evidence.

This is a serious responsibility. The legislature has, in its wisdom, confided the determination of such cases to a jury in place of the Court, upon which it formerly devolved, and a very difficult task it is. In the great variety of questions which in this country are referred to a jury, there are few so difficult to handle as the contentions of an unhappy marriage. In the

common run of other cases the inquiry is spread over a limited range of time; the conclusion depends upon the converging effect of independent facts and witnesses, often largely fortified by written documents, and illustrated by the daily practice of trade, or the ordinary events of life; and although the jury is often embarrassed by the collision of directly contrary testimony, they commonly receive much aid and support from those portions of the case that rest in writing, or are plainly and undeniably proved. They are seldom without some guide beyond the credibility of the parties themselves. But in cases of conjugal dispute, when cruelty is the issue, it is far otherwise. The domestic history of years is poured forth by husband and wife in alternate streams of opposite colours; the memory of each is ransacked for the most trivial details; the posture of each mind is antagonistic in the extreme, drawing memory and sometimes imagination after it in the attack or defence. Events are often misplaced in date, and always exaggerated in aspect. Unqualified accusations serve only to elicit absolute denials, and amidst a volume of evidence and at the end of a protracted investigation, the truth, obscured, disfigured, and transformed by prejudice and passion, is hard indeed to find.

Nor does the nature of the case admit of much aid. Corroboration is seldom forthcoming. Those portions of their time which married people spend in quarrelling are not their most public moments. If a third person becomes witness to their outbreaks it is generally a servant, and such persons generally enlist their feelings on one side or the other. Written evidence there is seldom any, save letters, which, though they strongly illustrate the general tone and feelings of the writers, seldom or never assist the proof of a disputed fact. So that in the result the credibility of the parties themselves, their demeanour before the Court, and their general bearing in word and deed, come to be the sole materials out of which the decision must be constructed.

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1863. There is probably no tribunal so fit to handle such materials
Nov. 6 and 12. as a body of men like a jury; though it is not to be expected
but that they should sometimes fail. But if it is difficult for
a tribunal under such disadvantages to do right, how much
more difficult is it upon the same materials to pronounce that
it has done wrong? Where so much is obscure, who shall
pretend to see plainly? And yet that is what the Court must
be enabled to do before it can justify an interference with the
verdict which a jury have found.

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I will take this early occasion for stating the principles which should guide the Court in the use of this power. New trials are in themselves an enormous evil, though there are cases in which justice demands them. No element in the administration of justice is so destructive of its efficiency as uncertainty; and no grievance more sorely felt by suitors than that which snatches success away at the moment of its accomplishment, and sets all abroad and in doubt again after one complete hearing and decision. Nothing shakes so much that confidence in the law which it is the first duty of all tribunals to uphold. The Court does not exercise the function of mere appeal from the jury. It is not its duty to go over the same ground with them, and reverse their decision merely because it arrives at an opposite conclusion; it must see its way very plainly, and be satisfied with tolerable certainty that there has been error or miscarriage; failing that, it is bound to accept the verdict as correct.

It remains to consider whether this case is of that class. I do not propose to examine the evidence in detail; a short review will suffice. It appears that the parties lived together on tolerable, if not satisfactory, terms at first; that they afterwards had frequent quarrels, and that their condition at last was that of complete estrangement with violent altercations. The chief foundation of these altercations was discreditable to the husband in the extreme—a greed for money from his wife and her mother. But there were other causes;

the wife, though she denies it, is proved by independent testimony to have dressed in a manner which the husband appears to have thought, with some reason, to be both extravagant and unbecoming. To this has to be added the frequent intervention of Mrs. Morris, the mother-in-law, who, while resisting the extravagant demand of the husband for money, was the constant refuge and resource of the wife. Ten years of the married life of persons thus inclined and situated, reproduced in evidence, has furnished the jury with a volume of evil words and ungracious, unmanly, if not violent deeds. It was not difficult for the learned Queen's Advocate, in addressing this Court with this evidence in his hands, to hold up a most repulsive picture of the petitioner. With lines and colours from the same source, I am not sure that a likeness of the lady drawn by an adverse hand would be much more attractive. But these are the prejudices which beset the case. The learned and able Judge who presided at the trial warned the jury against them, and it is the duty of the Court to forget them now, save so far as they throw light on the evidence of cruelty in its legal sense. Now, what is that evidence? It may be epitomized thus:—The wife swears to six distinct acts of violence; I will take them in order. First, the beating of the child in her presence in an excessive and cruel manner; secondly, the threat to shoot both children and wife with a pistol; thirdly, an unprovoked blow on the leg with a heavy stick at Inverness; fourthly, three blows on the face, said to have been inflicted on the 28th of January, 1858, at Strontian; fifthly, the twisting of a piece of velvet with violence round her neck about October 7, 1858; sixthly, the blow on the face, said to have been inflicted in 1861, when she refused to come away from the window in London.

These several acts are all, save the last, supported by the wife's oath alone; she called only one of the servants, who from time to time lived in the house with her. This one was Ann Morse, but she entered her service as late as May, 1861,

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1863. and is in her service still. This woman, speaking of May,
 Nov. 6 and 12. 1861, says, "she saw her mistress coming upstairs one eve-
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 ning; that her mouth was bleeding very much, and there was
 "a mark on the mouth as of a blow, which continued some
 days." So stood the wife's case of violence—an amply suffi-
 cient one if the wife's oath could be relied upon, which was
 the real question the jury had to determine.

Now, the husband met all these six charges with an absolute denial. Some he represented as inventions altogether, and some as exaggerations. He admitted beating the child, but said it was with a switch no bigger than a pen, and that not until the child had previously kicked him. He swore the child did not faint, and was not sick (as the wife had stated); he vouched the two servants, M'Ewen and Charlotte Palmer, who came into the room at the time, both of whom he said were outside the Court, and the latter of whom he called as a witness. She said, "I found the child lying in Mrs. Scott's lap—not crying then; my duty was to wash and dress him. I saw no marks on him. I saw a stick in Captain Scott's hand—a switch. I saw no brandy; did not see him sick; did not see the child faint. He was lying quietly in his mother's arms, not half a minute after I heard him crying and sobbing."

Then, as to the charge of threatening to shoot her, the petitioner swore he did not possess a pistol at the time, and that he made no such threat. The wife, in cross-examination, admitted she did not see the pistol, and said he held it under his coat. And Dr. Wodehouse, speaking of a subsequent occasion, when the charge of threatening to shoot was brought up against the husband by Mrs. Scott and her mother in his presence, says Captain Scott said he had no pistol in his possession at the time. Upon being pressed, Mrs. Scott said it might be something else; she did not say what.

The third charge is of a blow on the leg, which Captain Scott declares to be an invention, and he examines the maid who

was with her at the time, who answered, in cross-examination, that "she did not remember ever fomenting Mrs. Scott's "leg." The fourth charge is met with a total denial, as also is the fifth; and as to the sixth, the petitioner declares he removed her from the window with no unnecessary force, and accounts for the condition of her mouth by saying that "she constantly had something the matter with her teeth and "gums—gumboils and swellings of the face."

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He also gave general evidence. He called two other servants besides Charlotte Palmer, Selina Morgan and Sarah Wheeler, one of whom was thirteen months in their service. They all three depose that they never heard swearing or bad language on Captain Scott's part, and that they witnessed no violence. In addition to this, the petitioner called Colonel Simmons, who saw a good deal of them in 1861; Mr. Harrison, who often saw them together between 1844 and 1858; Dr. Wodehouse, who saw them in 1853; and Mr. Boulton, who was with them at the shooting quarters in Scotland. They all give a favourable account of his demeanour to his wife, and expressly deny a habit of using bad language. He examined another witness, Mrs. White (his own sister), who, though she says there were often words between them, says she never heard him swear at or use any violence to his wife.

Surely this evidence presented a case on the husband's part well worthy of attention. Whatever may be said in condemnation of his general conduct, here was surely cogent evidence in denial of those instances of personal violence which were relied upon as sustaining a charge of cruelty. The jury believed the husband. Who can assert that they ought to have believed the wife? They were not without reasons for doubting her entire truth. Not to mention the contradictions she received from the witnesses already named, I have been much struck with the evidence as to her dress. A distinguished officer, Colonel Simmons, C.B., says he saw them

1863. in 1860 and 1861 frequently; and in cross-examination, he
Nov. 6 and 12. said, "Mrs. Scott was very fashionably dressed; that seemed
"to outrage Captain Scott's feelings; he spoke to me about it."
Scott "Now the husband had sworn that "her dress was not such as
v. "ladies walk in." Whereas the wife swore positively, "the peti-
Scott. tioner did not object that I went too much dressed, but some-
"times said he would not walk with me unless I was smarter."
The subject was not a very material one, but such discrepancies
tend much to break down confidence and invite distrust,
and it may be that the jury so regarded them.

I will dismiss in a few words the remaining ground for this application. Three affidavits are offered to the Court. The substance of them is, that after the close of the respondent's case, but before the trial was concluded, a witness presented himself in Westminster Hall who could have corroborated the respondent upon one or more of the instances of cruelty to which she had sworn. The respondent desires a new trial that she may have the benefit of this evidence. But this is quite inadmissible. The affidavits disclose no surprise, and the proposed additional testimony is not in denial of some point or matter introduced unexpectedly on the other side, but only additional to and in affirmation of the case made, and all along intended to be made, by the respondent herself. It has never been the habit in Westminster Hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise, there are few cases that would not be tried a second time. But in this case there is the further fact that if application had been made to the Judge at the trial he might have allowed the evidence to be given. The result is, that the Court declines to interfere. I am sensible that in so deciding I may be affirming a decision which is erroneous, but the same might be said of an opposite decision had that been arrived at instead. And in the uncertainty which besets

every step of such an investigation, I feel bound to accept the decision which a jury pronounced after a long and patient trial, and under the guidance of a most impartial Judge.

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OSBORNE v. OSBORNE AND MARTELLI.

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Same Issues in Cross-Suits.—Staying One Suit.—Commission to examine Witnesses.—Practice.

Where the same issues are raised in cross-suits (made necessary by the imperfect powers granted by the Legislature to the Court), the Court will, as a general rule, stay one, and that without reference to their relative positions in the cause-list. In such a case, if a commission to examine witnesses is granted, it will be drawn in such a form as that the evidence shall be available in the stayed suit, should that come to a hearing.

These proceedings were in the nature of cross-suits. The husband's petition for dissolution of marriage by reason of the wife's adultery with Martelli was filed on the 30th of May, 1862. The respondent appeared and answered, charging the petitioner with adultery, cruelty, and desertion, and praying a judicial separation. Both petition and answer were amended, and on the 27th of May, 1863, the issues were directed to be tried before the Court by a common jury.

In the wife's suit, the petition filed on the 28th of March, 1863, charged adultery, desertion, and cruelty, and prayed a judicial separation. The husband's answer brought the same charges against the wife as contained in his petition. On the 27th of May, 1863, the issues raised in this petition were also directed to be tried before the Court by a common jury. The wife's petition was set down first for hearing in the registry,

1863. and the causes stood as in the above order, Nos. 54 and 55,
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Dr. Spinks, on behalf of the wife, was now instructed to ask for commissions to issue in both suits to examine certain necessary witnesses in Paris, and that the husband should pay a sum of money to meet the wife's expenses in respect of both the commissions. He understood that the learned Judge in chambers had made an order that the wife's petition should be stayed till the husband's petition was disposed of, and ventured to offer the following remarks to the Court on the practice in such cases, and the necessity of the double petition. On a petition for dissolution of marriage, it has been supposed that the Divorce Act only enables the Court to pronounce a decree, or to dismiss the suit. It cannot make any substantive decree on the facts which may be alleged in and proved on the answer; hence the necessity of the two petitions. Again, on a petition for dissolution by the wife (though that is not the present case) her evidence, and that of the husband, is admissible on the issues of cruelty and desertion, but on the same issues raised by her answer their evidence is inadmissible: (22 & 23 Vict. c. 61, s. 6). This double suit is common enough; an instance of it is *Burroughs v. Burroughs*, 2 Sw. & Tr. 544, and, however hardly this may bear on the husband in respect of costs, as in *Hepworth v. Hepworth*, 2 Sw. & Tr. 414, the Court has not hitherto considered itself at liberty to interfere with the order in which the parties have entered the causes for trial or hearing.

THE JUDGE ORDINARY: The question raised, though not quite regularly, on the present motion, is one of great importance, and I am much obliged to Dr. Spinks for his remarks. I must take time to consider of the proper course.

Cur. adv. vult.

November 24. THE JUDGE ORDINARY: This was an application for two

commissions to issue in two suits. The husband's suit was commenced first. The wife's suit was not begun till after a lapse of ten months, but was first set down for hearing. I made an order in chambers that the wife's suit should be stayed. The necessity of the double suit is undoubtedly caused by the defective power given to this Court by the Legislature. The Court has no power, on a petition for dissolution, to make a substantive decree in favour of the respondent; and the same evidence is admissible or inadmissible, as it applies to issues raised on the petition or on the answer. In the previous cases referred to by counsel, the wife's suit was the first instituted, so that they do not strictly apply; I do not, however, rely upon that distinction. I shall adhere to the order that the wife's suit shall be stayed, because I cannot help seeing that, if the husband's suit is decided one way, it would, if not legally, yet practically, put an end to the second. Wherever there are two suits in which the same issues are raised, and I can find a legitimate reason to stay one or the other, I will do so. The order for the commission in the husband's suit may be drawn up in such a form as that the evidence may be available in the wife's suit if that comes to a hearing.

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(*Before THE JUDGE ORDINARY (SIR C. CRESSWELL), and a Special Jury; and before SIR J. P. WILDE (JUDGE ORDINARY), on Rule for New Trial.*) July 11, Nov. 7,
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BOULTING v. BOULTING.

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*Wife's Suit for Judicial Separation.—Adultery of Husband.—
Connivance.—Delay.*

A. married B. in 1833. A. since 1835 lived apart from B., her husband, under an ordinary separation deed. About 1842, B. commenced an

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adulterous cohabitation with C., which continued to the date of the trial. A. was aware of the fact of the adulterous cohabitation in 1843, and thenceforward. A. petitioned for judicial separation, and issues of connivance and undue delay were found against her by the verdict of a special jury. A rule *nisi* for a new trial, on the ground of insufficient evidence of connivance, was granted, but discharged on argument.

SEMPLE, undue delay cannot be pleaded in bar to a suit for judicial separation; but lapse of time between knowledge of the conduct complained of and the commencement of the suit requires explanation, and may, along with the circumstances of the case, induce the Court to withhold the relief sought. In such cases the Court will require to be satisfied of the sincerity of the complaint of the petitioner.

This was the wife's petition for judicial separation by reason of the husband's adulterous cohabitation, since the year 1859, with one Ann Attfield. The respondent answered, that he had been ever since the year 1842 living in adultery with Ann Attfield, and that the petitioner knew ever since the year 1843 that he had been so living in adultery, and that the petitioner had acquiesced in and connived at such adultery, including the adultery alleged in the petition, and that the petitioner had been guilty of unreasonable delay in presenting the petition. The replication traversed knowledge in and since 1843, and acquiescence, and connivance, and unreasonable delay; and these issues were tried before Sir C. Cresswell, by a special jury, on July 11, 1863, when the following facts were proved:—The petitioner, then Ann Saul, was married to the respondent in March, 1833, Boulting's father being an ironmonger and smith, which business he (the respondent) had since followed, the wife's father being a greengrocer and coaldealer. The parties finally separated under an ordinary separation deed, dated the 14th of November, 1835, by which the husband agreed to allow the wife 7*s.* a week. About five or six years after the separation, the husband began to cohabit with Ann Attfield, and had continued to do so since. From July or August, 1843, the wife was aware, from the in-

formation of persons who asserted a direct knowledge of the fact, and that they would swear to it, that her husband was living with Ann Attfield. During part of the interval between the separation and the petition, both parties and their families were living not far from each other, in the neighbourhood of the Middlesex Hospital; but it did not appear that the wife had ever entered the husband's house since 1835, or in any way consorted with him or Ann Attfield.

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The Queen's Advocate (Sir R. J. Phillimore), *Mr. H. Mills*, Q.C., and *Dr. Swabey*, for the petitioner.

Mr. A. Staveley Hill, and *Mr. Cohen*, for the respondent.

CRESSWELL, JUDGE ORDINARY, in substance told the jury that if they thought, from the facts proved, that the wife had given a willing consent to the adultery of which she now complained, that was in law connivance; and the jury found all the issues in favour of the respondent.

Before WILDE, JUDGE ORDINARY. *The Queen's Advocate*, (Dr. Swabey with him) moved for a rule *nisi* for new trial, on the ground of misdirection, and that the verdict as to connivance, which they submitted was the only material issue in a suit for judicial separation, was against the weight of evidence.

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Cur. adv. vult.

THE JUDGE ORDINARY granted a rule *nisi* for a new trial, on the ground that there was not sufficient evidence to go to the jury on the issue of connivance.

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Cause was shown by *Mr. Hawkins*, Q.C., and *Mr. Cohen*. They submitted that at least there was evidence to go to the jury as to connivance, and it could not be said, on the facts proved, that their verdict was wrong. The inference was one

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which it was peculiarly their province to draw ; but, further, the question of undue delay is one to which sufficient weight has not been given. The Ecclesiastical and this Court, up to the present time, has always taken into consideration delay in bringing forward the complaint in cases of judicial separation, and it would seem that where the delay is considerable and unexplained, the Court is not bound to entertain the suit or grant relief. As to connivance, they cited *Phillips v. Phillips*, 4 N. C. 523 ; *Thomas v. Thomas*, 2 Sw. & Tr. 113. As to undue delay : *Walker v. Walker*, 2 Phil. 153 ; *Angle v. Angle*, 6 N. C. 192 ; *Matthews v. Matthews*, 1 Sw. & Tr. 499. In *Cooke v. Cooke*, 3 Sw. & Tr. 130, though Sir C. Cresswell considered undue delay as not of itself a bar to the suit, yet, as combined with other circumstances, he said it might be a sufficient reason for dismissing a petition.

THE JUDGE ORDINARY : If there is such delay, taken with the other circumstances of the case, as to induce the Court to refuse the relief prayed, there would certainly be no use in sending the issue of connivance to be tried by a fresh jury.

The Queen's Advocate and *Dr. Swabey*, in support of the rule. None of the cases cited, nor those decided in the present Court, go to the extent that connivance is constituted by a bare knowledge of the misconduct of the other party. There must have been an intention that the guilt complained of should follow the course of action or inaction of the party against whom connivance is alleged (*Allen v. Allen and D'Arcy*, 2 Sw. & Tr. 108, note ; *Marris v. Marris and Burke*, 2 Sw. & Tr. 530). Again, more stringent proof of such guilty intention or consent is necessary where the adultery did not take place during the cohabitation of the husband and wife (*Rogers v. Rogers*, 3 Hagg. 72). As to unnecessary delay, in some of the cases cited, the remarks of the learned judges apply to delay in the prosecution of a suit after proceedings

commenced, or the cases are cases of cruelty where the cohabitation and acts of cruelty had ceased for various periods before the complaint made. In *Angle v. Angle* (which is a case of adultery), 6 N. C., at p. 198, Dr. Lushington said, "As to delay, if the husband had been resident in England, the delay would have been no bar." But whether weight may have been given in other cases to delay, the present is a case of a continuing injury; the husband is now living in adultery, and in regard of that adultery the wife must be entitled to a decree of judicial separation, unless her conduct amounts to a legal bar. Unless, then, the delay since the wife first knew of a fact of adultery amounts, with other facts proved, to connivance, it is immaterial in the present case, for she complains of adultery of quite recent date. In the cases of *Baker v. Baker*, before the Court in 1859-60, unreported, and *Wilcock v. Wilcock*, November, 1859, reported on a question of alimony only, 32 L. J. 205, Prob. and Mat., the wives obtained a decree of judicial separation in circumstances very like those of the present case.

Cur. adv. vult.

THE JUDGE ORDINARY gave the following judgment:—This is a suit promoted by the wife against the husband for a judicial separation on the ground of adultery. It was commenced on the 20th of December, 1861. The adultery was proved at the trial, when the following facts were also established:—The respondent was by trade an ironmonger, at first in partnership with his father. His marriage with the petitioner took place in 1833. After one or more previous separations, attributed by the husband to the drunken habits of his wife, they finally agreed to live apart, he allowing her 7s. a week. This took place in 1835. As early as 1841, the respondent commenced living with a woman named Ann Attfield. This woman lived with him at his lodgings in all respects as his wife, in the same street and within a few doors of the petitioner, who had

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taken up her abode with her relatives. It was proved that, as early as 1843, and probably earlier, Mrs. Boulting was aware of this circumstance, and on several occasions, between 1843 and October, 1861, the persons who took her weekly allowance from her husband conversed with her, or in her presence, about this adulterous connection. These conversations, as detailed by the witnesses, were in terms of complete indifference on her part.

It thus appears that, for a period of seventeen years, the illicit cohabitation on which the petitioner grounds her suit as an intolerable grievance, existed under her close observation; never at any considerable distance; for long in the same street, when she resided with her relatives, and within a few doors of her abode. With what feelings did she regard it? This is the all-important question. Did she resent it as an outrage on her marriage rights? Did she chafe at the idea of her place being occupied by another? Was she angry? Was she jealous? Was she moved by a consciousness of indignity, or stung by a sense of wrong? Perhaps not; for she had long since voluntarily withdrawn from cohabitation with her husband, and was living apart upon an allowance he made her. But if she felt none of this, was the converse her condition of mind? Did she view with apathy and indifference a relation set up with another which had ceased to exist for herself? Was she willing that her husband should continue his mode of life, provided he gave her the means of continuing her own? Was she satisfied, acquiescent, content, well pleased, *quieta non movere*,—not averse to maintain her separation and allowance, and accept the condition of things? I know of no tests of inward feelings but the outward signs of act and speech. How did she act? What did she say? For seventeen years the petitioner did nothing to abate the evil, and took no steps, legal or otherwise, to assert her rights. She did not apply to the ecclesiastical tribunal. When this Court was established she forbore to apply to that. She made

no complaint, and offered no remonstrance to her husband. She had friends and close relatives, but she did not invite their intervention. Nay more, she does not appear to have uttered to any human being a single word of anger, reproach, or even displeasure when the subject was mentioned in her presence. And yet she was living among her own family and subject to no restraint. Fortified by the sure sympathy of those around her, she was exactly in the position in which one would expect her natural feelings to break from her in speech, or find vent in action.

It is said that, as a poor and ill-educated woman, legal proceedings were scarcely within her reach. But an angry ejaculation, a menace or a hard word levelled at her husband or the woman with whom he was living, these, alas ! are within the reach of all, and too natural for their absence to be overlooked, if she were really outraged by her husband's misconduct. The case was submitted to a jury. The judge told them, that if the conduct of the party shows that she has no objection to it, that is willing consent. Was she willing to accept a provision and that her husband might live with that woman provided he paid the allowance? And they found that the petitioner connived at this adulterous connection.

Now, connivance is an act of the mind ; it implies knowledge and acquiescence. I prefer the word "acquiescence" to "consent," because the latter in some respects carries with it an idea of leave or licence conveyed or signified to the erring party. As a legal doctrine, connivance has its source and its limits in this principle, *volenti non fit injuria* : a willing mind, this is all that is necessary. Such is the result of the decisions. They are brought together in Sir Herbert Jenner's judgment in *Phillips v. Phillips*, 4 Notes of Cas. 528. But how is knowledge and acquiescence to be proved? The answer is, like any other conclusion of fact. It may be proved by express language or by inference deduced from facts and conduct. And so in this case, the jury, having all the circum-

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stances before them, and looking to what the petitioner said and did, and perhaps still more at what she forbore to say and do, were convinced that she did in fact connive and acquiesce for a long time in that connection which she now after seventeen years denounces. In this conclusion I cannot say that they were wrong, and the verdict must therefore stand.

I might stop here, but other ground has been opened in argument—the long delay. This has been argued as a bar to the suit. I agree with the Queen's Advocate that it is not so. But it is a most material matter, which unexplained would lead the Court to conclusions fatal to the petitioner's relief. The true effect of delay in these suits is well expounded by Lord Stowell in *Mortimer v. Mortimer*, 2 Consist. 313. The first thing which the Court looks to “when a charge of adultery is preferred is the date of the charge relatively to the “date of the criminal fact and knowledge of it by the party, “because if the interval be very long between the date and “knowledge of the facts and the exhibition of them to this “Court, it will be indisposed to relieve a party who appears “to have slumbered in sufficient comfort over them, and it “will be inclined to infer either an insincerity in the complaint or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full “and satisfactory explanation of this delay in order to take “it out of the reach of such interpretations.” Thus, though delay of itself goes for little, the conclusions to which it may give rise may go the full length of barring the remedy. All depends on the other facts of the case. And in this case it had its effect, no doubt, on the jury in determining the question of connivance. A wider ground remains. It is impossible to read the judgments of those who have administered the ecclesiastical law without appreciating the jealous care and reluctance with which they interfere with the obligations of the marriage vow. They never lose sight of the fact that, as cohabitation is the first object of marriage, separation should

be the last expedient of the law. This expedient they therefore applied with a large and cautious discretion. Hence the doctrines of condonation, connivance, and recrimination. Before the Court interfered, it ever insisted upon clean hands—a real grievance—a very present wrong,—and above all, sincerity—sincerity in the purpose for which the suit is instituted. The petitioner must feel and suffer under the wrong of which complaint is made, and the Court must be satisfied that the remedy is sought as a genuine relief from the pressure of that grievance. Such is the beaten track of the decisions. It is impossible to tread too faithfully in footsteps so wisely placed. For seventeen years has this wife been passive. What is the cause of her present attitude? It may be that a judicial separation would yield an alimony, in her husband's present circumstances, greater than the allowance she has been content to receive so long, or there may be other reasons. But the Court looks in vain for any legitimate cause why she should suddenly regard her husband's conduct now in any different light from that of past days. Her husband has not interfered with her, has not changed his conduct towards her, or his own mode of life. So far as the evidence went, the entire situation of the parties has remained wholly unchanged. Does the wife desire separation? She has it, in fact, already. Does she require support? She has that too, and upon terms arranged by herself. The Court cannot believe in the sincerity of such a suit, and must withhold from Mrs. Boulting any relief now founded upon an adulterous connection over which for years she seems to have "alumbered with sufficient comfort."

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Petition for Dissolution.—Compromise.—Subsequent Misconduct.—Subsequent Suit.

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On a wife's petition for dissolution of marriage, certain issues of cruelty and adultery came on for trial on the 12th of March, 1861, when an agreement was signed by the respective counsel of the parties, by which, *inter alia*, a separation-deed was to be executed, and the petitioner agreed not to take further proceedings in this Court. The petitioner moved the Court to set down the case again for trial, on the ground that the agreement was not signed by counsel with her consent; the Full Court, on appeal, confirmed the Judge Ordinary's rejection of this motion. In 1863, the petitioner filed a fresh petition, alleging the same acts of adultery as in the former petition, certain other acts previous to March, 1861, which she alleged had only come to her knowledge in the early part of 1863, certain other acts of adultery since March, 1861, and various acts of cruelty, some alleged to be different from those contained in the former petition. In the result, the Court held that the petitioner was bound by the agreement of March, 1861, not to take any proceedings in the Court in respect of any matter before that date; and as the subsequent acts of adultery, to which the Court held the agreement not to extend, would not of themselves support the wife's petition for dissolution, refused to give any directions as to the mode of trial.

In this case the wife, by her petition dated the 9th of May, 1863, asked for a dissolution of her marriage by reason of her husband's adultery and cruelty. The petition stated the marriage to have taken place in 1844, and that the cohabitation of the parties finally ceased in November, 1854.

The charges of cruelty and adultery alleged in the petition may, for the present purpose, be classed as follows:—1. Acts of adultery before the 12th of March, 1861, of which certain specified acts were alleged not to have come to the knowledge of the petitioner till early in the year 1863. 2. Acts of adultery since the 12th of March, 1861. 3. Acts of cruelty during cohabitation, *i. e.* before November, 1854.

The respondent's answer, filed the 5th of June, 1863, stated :
 —1. That the petitioner did, by her petition bearing date the 25th of February, 1860, petition this honourable Court for a dissolution of her marriage with the respondent on the ground of his alleged adultery and cruelty, and the issues raised on such allegations of adultery and cruelty between the petitioner and the respondent came on for trial before this honourable Court and a special jury on the 12th of March, 1861, when, with the consents respectively of the petitioner and the respondent, a memorandum of agreement to the following effect was drawn up and signed by the counsel for the respondent and petitioner respectively :—

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“ In the Divorce Court.—*Rowley v. Rowley*.—A juror with-
 “ drawn, and the petitioner to move at the proper time to have
 “ the petition taken off the file, the respondent consenting to
 “ the application; the respondent undertaking to execute a
 “ deed of separation, with covenants with a trustee to be named
 “ by the petitioner not to molest the petitioner, nor to put in
 “ force the sentence of the Privy Council, and other usual
 “ covenants in such a deed, including a covenant to allow the
 “ petitioner to choose her own place or places of abode. The
 “ deed to be prepared by the solicitor for the petitioner, and at
 “ her expense, the respondent bearing his own costs attendant
 “ on the execution and settling of the deed. Mr. Dart to
 “ settle the deed if solicitors differ. The petitioner under-
 “ taking not to institute other proceedings in the Divorce
 “ Court; each party to pay his own costs of this suit.

“ (Signed) J. P. Deane, for the respondent.

“ Wm. Atherton, for the petitioner.”

By reason of the aforesaid consents and agreements the aforesaid issues were not submitted to the jury.

2. That the petitioner has not taken any step to have the said petition, bearing date the 25th of February, 1860, removed from the file of this honourable Court.

3. That this petition is filed by the petitioner in breach of

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 vember, 1863,
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4. That the acts of adultery alleged in (certain) paragraphs of the petitioner to have been committed by the respondent with A. G., are the same acts of adultery as were alleged by the petitioner against the respondent in the said petition bearing date the 25th of February, 1860.

5. That the acts of cruelty in the present petition alleged, other than those alleged by the petitioner in her said petition bearing date the 25th of February, 1860, were known to the defendant on the 25th of February, 1860.

6. General traverse of adultery alleged.

7. General traverse of cruelty alleged.

8. That the petitioner is in receipt of the yearly income of not less than £700, secured to her separate use, and independent of the control of the respondent by an indenture of settlement, etc.

Prayer:—To decree that the petitioner ought not to be allowed to prosecute this petition, to dismiss the petition, and condemn the petitioner in costs.

To this the petitioner, on the 16th of June, 1863, filed a replication, stating,—1. That the petitioner denies that the said memorandum of agreement in the first paragraph of the answer mentioned was signed by her counsel, with the consent of the petitioner, as in the said first paragraph pleaded, and the petitioner takes issue thereon. 2. That the petitioner denies that the petition in this suit is filed by her in breach of the undertaking not to institute other proceedings in this honourable Court, as in the third paragraph of the answer alleged, and petitioner takes issue thereon. 3 and 4 joined issue on the traverses of adultery and cruelty.

On this state of pleadings the Court was moved on behalf of the petitioner, during the sittings after Trinity Term, 1863, to order the issues raised to be tried before itself by a special jury, and the Judge Ordinary refused to make any order as

to the mode of trial till the allegations of adultery and cruelty, which had been contained in the petition of 1860, had been struck out.

Early in Michaelmas Term, 1863, the petitioner obtained an order on summons from the Judge Ordinary to amend her petition, by striking out such allegations of adultery and cruelty.

Subsequently the Court was moved by *Dr. Swabey*, on behalf of the respondent, to strike out the remaining paragraphs of the petition. He submitted that the petition, as amended, contained charges under three heads:—First, acts of adultery before the 12th of March, 1861, said not to have come to the petitioner's knowledge till the early part of the year 1863; secondly, acts of adultery since 12th of March, 1861; thirdly, acts of cruelty which, on the face of the petition, must have been known to the petitioner in 1860 and 1861. That the agreement of March, 1861, precluded the petitioner from any further proceedings against her husband in respect of misconduct, whether before or after the date of the agreement. That if the agreement did not go to that extent, it at least hindered her proceeding in respect of all adultery before that date, and of all cruelty, whether alleged to be the same or different acts from those charged in the petition of 1860, for they were obviously all within the knowledge of the petitioner in 1860, and in March, 1861; and it never could be intended that a wife should make such an arrangement in respect of certain alleged acts of cruelty, and then be at liberty to re-open the whole matter. The issue which the petitioner now wishes to submit to a jury, as to whether the agreement of March, 1861, was signed by her consent, was, in fact, decided by the Full Court on the 4th of June, 1862, on appeal from an order of the Judge Ordinary, rejecting a motion of the petitioner that the petition of 1860 should be again set down for hearing. The form in which the question now comes before this Court is perhaps unusual, but on behalf

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1864. of Mr. Rowley, it is a great object to save expense. From the affidavit of Mr. Duncan, the respondent's solicitor, it appears that the respondent has observed, as far as in him lay, the conditions of the agreement.

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Mr. Karlake, Q.C. (Dr. Tristram with him), contra.
The issue on the question, whether the agreement was binding or no, cannot be got rid of on a motion of this sort. Where the equitable interference of the Court is sought, it must be at as early a stage of the proceedings as possible. We should also contend that the acts of adultery alleged to have taken place since March, 1861, would revive the acts of adultery and cruelty which were the subject-matter of the petition of 1860.

THE JUDGE ORDINARY: As I have been pressed to give my opinion on the questions raised on the present form of the proceedings, I will do so, as far as I can. I do not think that the agreement of March, 1861, precludes the wife from complaining of the subsequent misconduct of the husband, but I think it extends to all matter of complaint before that date. It is stated that the question of Mrs. Rowley's consent to the agreement of March, 1861, was decided by the Full Court. The respondent had better file a rejoinder, pleading that decision. When that appears on the record, I shall be able to deal with all charges before the date of this agreement.

A rejoinder was accordingly filed on the 30th of November, 1863; stating that the issue raised by the first paragraph of the petitioner's replication herein was decided between the same parties in favour of this respondent, by the several decrees of this honourable Court, given by the then Judge Ordinary, and on appeal from the decision of the then Judge Ordinary by the Full Court, of which decrees the minutes extracted from the Divorce and Matrimonial department of the principal registry of Her Majesty's Court of Probate are hereinafter set out.

The last of such minutes was in substance as follows :—

“ June 4, 1862.—Before the Right Hon. Sir Cresswell Cresswell, Kt., etc., the Hon. Sir William Wightman, Kt., etc., and the Hon. Sir James Shaw Willes, Kt., etc., three of the Judges of Her Majesty’s Court for Divorce and Matrimonial Causes, sitting in open Court at Westminster.

“ The Judges having heard Mary Ann Jephson, otherwise Jephson Rowley, the petitioner, in person, pronounced against the appeal interposed on her behalf from an order of the Judge Ordinary, made on the 12th of June, 1861, whereby he rejected a motion made on behalf of the said petitioner for a rule ordering John Jephson, otherwise Jephson Rowley, the respondent, to show cause why the petition should not be put upon the file again for hearing, and a new trial granted.”

The petitioner’s surrejoinder, filed the 7th of January, 1864, stated :—1. That petitioner denies that the issue raised by the first paragraph of her replication was decided in favour of the respondent, by the several decrees referred to in the said rejoinder. 2. And the petitioner further saith, that the several allegations of adultery and cruelty set forth in the amended petition filed by her in this cause, were not, nor was any of them, set forth in the petition filed by her in the said former cause, nor were all, nor was any of them, in issue in the pleadings in the said former cause.

On this state of pleadings the Court was moved on the 19th of January, 1864, by—

Dr. Tristram, on behalf of the petitioner, to give directions as to the mode of trial. Adverting to the opinion expressed by the Court on a former occasion, he submitted that acts of cruelty which might have been within the knowledge of the petitioner before the 12th of March, 1861, would be revived by the proof of the subsequent adultery, and that therefore she had a right to go to a jury on the issues of cruelty now alleged in the petition, and the subsequent adultery.

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Dr. Swabey, contra: The doctrine of revival cannot apply. This was an agreement to settle certain matters in dispute, and live separate. Condonation brings the parties together again after a wrong done; and for the protection of the party injured, the law annexes the condition of revival in case of any subsequent marital offence of which the Matrimonial Court can take cognizance. If the Court should be of opinion that the subsequent acts of adultery are the only ones which the petitioner has a right to go upon, there is no use in submitting that issue to a jury in the present form of the petition, which is for dissolution alone. *Cur. adv. vult.*

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THE JUDGE ORDINARY gave the following judgment:—In this case the Court was applied to for directions as to the mode of trial. The case is a remarkable one in its circumstances, and illustrates in a forcible manner the oppression which may be worked by the misapplication of the salutary powers of this Court. The petitioner is the wife of Mr. John Rowley. She was married to him on the 2nd of July, 1844. In October, 1848, she left his house, alleging cruelty on his part; this statement appears on her own petition. In January, 1849, she returned to him. In September, 1849, she appears to have left him again, and refused to return. Mr. Rowley then took steps to enforce her return. He commenced a suit for restitution of conjugal rights in the Consistory Court of York. This was in October, 1852. To this Mrs. Rowley set up, by way of defence, that he had been guilty of adultery and cruelty, and she prayed that a decree of divorce *à mensâ et thoro* should be pronounced in her favour on those grounds. The cause was carried by appeal to Her Majesty in Council, where it was ultimately decided, and the result was, that on the 29th of December, 1853, an Order of Council was made, on the recommendation of the Judicial Committee, to the effect that Mrs. Rowley had failed in proving the cruelty and adultery pleaded, and that she must return to her husband.

In January, 1854, she did so, but she left him again in November of that year, and has never cohabited with him since.

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On the 25th of February, 1860, Mrs. Rowley filed her petition in this Court, and prayed for a divorce, on the ground of cruelty and adultery. In this petition she did not confine her charges of cruelty or adultery to occasions subsequent to the above suit, but adduced several charges, dated in 1848 and 1849, which either were or might have been adduced in the former suit, which had been decided against her. The respondent having pleaded to this petition, the cause came on for trial before the late Judge Ordinary and a special jury, on the 12th of March, 1861, when the cause was withdrawn from the jury, with the consent of both parties, and the following memorandum drawn up and signed by their respective counsel. Mrs. Rowley has contended that it was not binding upon her, but the Full Court of Divorce, after hearing the parties, has decided that it was. [The learned Judge here read the agreement as set out above.] It is sworn in the affidavit of Mr. Duncan, and not denied by Mrs. Rowley, that Mr. Rowley has faithfully observed this agreement on his part. But Mrs. Rowley is not content. On the 9th of May, 1863, she filed another petition in this Court, notwithstanding her undertaking "not to institute other proceedings." The prayer was for divorce, and the grounds, adultery and cruelty. In this petition she repeated, in a number of paragraphs, the identical charges she had made in the suit which was compromised, as above stated, and added a variety of others. The late Judge Ordinary, when applied to for directions as to the mode of trial, perceived this, and refused to make any order till these old charges were struck out. They have been so, but a variety of charges of cruelty remain in the petition, which, though not brought forward in the former suit, bear date long before that suit was instituted. And it could not be otherwise, for Mrs. Rowley has never cohabited with her husband since

1864. November, 1854. The same remark applies to most of the
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June, 1861, and April, 1863. To these charges the respon-
dent has pleaded the agreement of March, 1861.

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Now, what is the effect of that agreement, and to what extent is the course which Mrs. Rowley has taken consistent with good faith, and an honest adherence to that arrangement? I cannot construe the agreement to mean anything else but that, in respect to her husband's past conduct at any rate, Mrs. Rowley consented to surrender, and that irrevocably, any legal right she might have to relief in this Court. I say any right she might have, for her case remained to be proved, and she might perchance have been as little successful on that occasion as she was in the previous suit. It is, therefore, in gross breach of good faith, and in violation of express agreement, that Mrs. Rowley has filed her present petition. The foundation of her prayer for divorce is the cruelty she alleges to have been committed by her husband during the cohabitation antecedent to the suit which resulted in that agreement. It is not in the nature of cruelty not to be within the knowledge of the party aggrieved. She has not even, therefore, the excuse that she did not then know the full extent of her then existing grievances.

Upon what ground, then, is it contended that this Court ought to permit Mrs. Rowley thus to withdraw herself from her own engagements? It has been ingeniously argued, that the adultery charged to have been committed in 1862, revived the previous cruelty, as it would do in an ordinary case of condonation. Now, condonation is that species of forgiveness or reconciliation which, in furtherance of the marriage bond, the Court has erected into a bar to legal proceedings for a separation; but which, in the interest of justice, the law has also declared to be only conditional on future good conduct. This has nothing in common with a direct and positive bargain not to resort to the powers of this Court, made between the

husband and wife, and reduced into writing. The conditions, if any, to which such an agreement is subject, must be found expressed or collected as implied in the language itself. But there is no such condition to be found. The agreement has been violated. Why should not the Court give it effect? There is a class of suits in which restitution of conjugal rights and the aid of the Court to enforce the obligations of marriage is sought, and to such, a voluntary agreement to live separate is no answer. But in cases like the present, where the Court is asked to derogate from, not to enforce, the marriage bond, it is far otherwise. If cohabitation is to be no longer continued, and choice is to be made between the legal and public remedy, and the voluntary and private arrangement, who can doubt between them? Expense, exposure, uncertainty, the exhibition in open Court of vows broken and duties neglected, to the great scandal of the public upon whom it is forced, as well as the parties to whom it is the sole legal resort,—such is the price that must be paid for a remedy which begins by bringing the marriage into disrepute, and ends by impairing or dissolving it. In contrast with this, a voluntary agreement to live apart almost ceases to be an evil, and should find no lack of favour from the Court, when it is designed to replace the greater evil of a public judicial sentence. The result is, that the Court declines to further Mrs. Rowley's suit by giving any directions for the mode of trial, and on proper application will entertain the question, whether the husband is not entitled to be dismissed from this suit.

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*Wife's Petition.—Cruelty.—Evidence suggesting Respondent's
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Where the evidence on behalf of the petitioner discloses facts from

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which the respondent's insanity may be inferred, the Court will require to be satisfied that such facts admit of a different explanation, before it will make a decree in favour of the petitioner.

This was the wife's petition for dissolution of marriage by reason of cruelty and adultery. The husband's answer traversed these charges, and pleaded condonation of the cruelty. The case now came on for hearing before the Court itself.

The Queen's Advocate (Sir R. Phillimore) and *Mr. Hannen*, for the petitioner.

Dr. Spinks, for the respondent.

The petitioner was examined as to cruelty. It appeared, among other facts, that during the latter part of the cohabitation, the husband had been more or less under the restraint of some persons in the house acting as keepers.

On cross-examination, no questions were put to the petitioner as to acts of violence which she had deposed to; but she was asked, whether she had not known before marriage that her husband was of violent temper and given to drink.

By the COURT: After the cross-examination, it does not seem necessary to call other witnesses as to acts of violence; but the question arises, whether the Court can proceed to make a decree in this case where there is strong evidence before it, that the husband is irresponsible for his actions?

The Queen's Advocate: The question does not arise on the pleadings; such a fact or defence must be before the Court in a known legal manner; by the husband's next friend, if he is now insane, or by himself, if now sane, but insane during the time spoken to. In *White v. White*, 1 Swab. & Tris. 592, the Court decreed a judicial separation by reason of the wife's

violence towards the husband, though it appeared that she had been, from time to time, in confinement as insane.

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THE JUDGE ORDINARY: In this case the Court desires further evidence, some serious questions having been raised. The sanity or insanity of the respondent is a question of which the Court must satisfy itself, and this, although it has come to light on the evidence, without being raised in the pleadings, for society has an interest in the maintenance of marriage ties, which the collusion or negligence of the parties cannot impair. It was faintly, and with great care not to be too explicit, argued that madness would be no answer, even if pleaded, and cases were cited, to which I have since referred. With danger to the wife in view, the Court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial. Thus, I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from "violent and disorderly affections," as said in one case, or from "violence of disposition, want of "moral control, or eccentricity," as said in another, or "from "a liability to become excited in controversy," in the language of a third; but madness, dementia, positive disease of the mind, this is quite another matter. An insane man is likely enough to be dangerous to his wife's personal safety, but the remedy lies in the restraint of the husband, not the release of the wife. Though the object of this Court's interference is safety for the future, its sentence carries with it some retribution for the past. In either aspect it would be equally unjust to act on the excesses of a disordered brain: in the latter, for the insane are not responsible; in the former, for insanity may be cured and the danger at an end. These positions appear to me, as at present advised, to be reasonable, and should the facts eventually bring this case within reach of them, may be safely acted upon. The case of *White v. White*,

1864. before the late Judge Ordinary, is, I think, in strong accord-
February 2. ance with them."

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Now, it has transpired in evidence that the respondent, for many months before his wife was obliged to leave him, had constantly a keeper in the house to restrain him; that he was kept without means, and followed by the keeper when he went out alone; finally, that he fled from the house suddenly and secretly with his keeper to York, taking his child with him. The presumption that he was out of his mind flows very naturally from such facts. For aught the Court knows, he may be now actually in confinement or under medical control, for there is no account of his subsequent history. But it is said that all this may be explained by the fact, that he was given to drinking and of violent temper. It may be so, but those who advised and arranged this treatment should be brought before the Court to elucidate that which they alone can explain away. The Court may then appreciate the respondent's condition and its causes. The case stands adjourned that they may do so.

February 6.

GRAVES v. GRAVES.

GRAVES
v.
GRAVES.

Wife's Petition.—Desertion and Adultery.

Where the intention of the husband clearly was not to live with the wife (he was, in fact, carrying on an adulterous intercourse before and after marriage), the Court held that it amounted to desertion on his part, though the wife actually left the house in which they last resided together, and, after she was aware of the adulterous connection, refused to return unless she was satisfied that such connection was at an end.

This was the wife's petition for a dissolution of her marriage, on the ground of the adultery of the husband, coupled with

desertion for two years. The respondent appeared, but filed no answer. The petition (filed the 25th of August, 1863) alleged a marriage on the 29th of May, 1860, in Dublin; that after the marriage the petitioner, at Holyhead, Chester, London, at Sutton Place, near Dartford, Kent, and at Tenby, South Wales, cohabited with her husband, but that there had been no issue of the marriage; that in or about the month of August, 1860, the respondent, without cause, deserted the petitioner, and had ever since continued so to desert her; that the respondent had, on divers occasions since the 29th of May, 1860, committed adultery with a female named Sarah Williams, at divers places in Wales. The petition now came on for proof before the Judge Ordinary.

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GRAVES.

Dr. Spinks, for the petitioner.

Mr. G. H. Cooper, for the respondent.

The facts of the case are sufficiently stated in the judgment.

Dr. Spinks, for the petitioner: The conduct of the respondent amounts to desertion from the 21st of August, 1860, when the petitioner first left Tenby. It matters not that the petitioner herself left her home, if her husband, with the intention of bringing about a separation, so treated her as to compel her to leave him. I know of no case precisely in point, but the American law, as stated in Bishop on the Law of Marriage and Divorce, section 514, seems to be correct:—
“Where the separation and desertion are concurrent in the
“time of their commencement, the guilty party is not always,
“or necessarily, the one who leaves the matrimonial habita-
“tion. Thus, to drive away the wife from the house is to
“desert her; and where a husband sent away his wife to her
“friends, and then, without any known cause, himself left the
“country, there having been no difficulty between them, only
“it was supposed he thought her too old for him, she was

1864. "held entitled to a divorce. So, where it appeared that the
February 6. "parties had some slight misunderstanding, and the husband,
GRAVES "having been absent from home a day or two, returned and
v. "told his wife to go and see her brother, who was sick at his
GRAVES. "residence a few miles distant, she went and found that he
"was well and had not been sick, and then, coming back
"home, found that her husband was gone,—this was held to
"be desertion in him. Indeed, it would be difficult to draw
"any distinction, except in the enormity of the offence,
"between a husband's openly leaving his wife with the avowal
"of his intent, and his removing her from him by stratagem
"or by violence." In sect. 515, he says: "There certainly
"can be no distinction between his intending to oblige her to
"leave him, and his intending himself to leave her." If a
husband, having the desire and intention to separate from his
wife, orders her to leave him, and behaves in such a manner
(without actual cruelty) as to compel her to separate herself
from him, the separation must be attributed to him, and
amounts to desertion. Here the respondent's insulting con-
duct to his wife, when considered in connection with his ab-
staining from consummating the marriage, his not supporting
her during the cohabitation, his declarations of dislike, and
his adulterous intimacy with Sarah Williams, show an inten-
tion on his part to separate from his wife, but to make the
separation appear to be her act, and not his own. His offers
to take her back are not inconsistent with this view, for they
were not made *bond fide*, but in such a way that he must have
known that they would not be accepted. Even if there was
not desertion in August, 1860, there certainly was desertion
from the time when the petitioner, in September, 1860, came
over to Ferryside and asked to be allowed to return to him.
She was always willing to return until she was informed of
her husband's intimacy with Sarah Williams; then she was
not willing to return so long as that intimacy continued, but
expressed to him her willingness to do so on condition that it

was broken off. *Gibson v. Gibson*, 29 L. J. 25, shows that her refusal to return to him, except upon that condition, did not put an end to the desertion. In Bishop, sect. 513, it is said:—"A consent to a separation is a revocable act, and if "parties separate by consent and one of them afterwards in "good faith seeks a reconciliation, but the other refuses to "return, or if they separate for cause and the cause is removed, "but one of them declines to renew the cohabitation, or if "a wife having left her husband without cause comes back "to him, and he will not receive her, this is a desertion in "the party so refusing from the time of the refusal. But "to entitle a person to a divorce under such circum- "stances, it must appear that the offer of return was sincere "and in good faith, free from any improper qualifications or "conditions, and really intended to be carried out in its spirit "if accepted. And in all cases the legal desertion ends with "the intent to desert, as when the party in the wrong under- "takes to come back, but is prevented." He also cited *Lawrence v. Lawrence*, 2 Sw. & Tr. 575; and *Oliver v. Oliver*, not reported.

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THE JUDGE ORDINARY: The evidence in this case discloses, no doubt, a very painful state of circumstances. The only question is, whether it establishes a case of desertion. Upon the whole, I am of opinion that it does. The word "desertion" is a new one as a legal term, constituting a ground for relief in matrimonial cases, and occurs for the first time in the Act by which this Court was constituted. It is very difficult to give a precise definition of it. Shortly after the marriage in this case, the respondent, without any fault on her part, brought about a withdrawal of the wife from his society. There was no desire or intention on his part of resuming cohabitation—I do not say conjugal intercourse, for it appears that the marriage was never consummated. The parties lived together from the 10th of July, 1860, until the

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21st of August of the same year, when, by the husband's conduct, the wife was compelled to leave his house. He made no attempt to get her back. He passed her on the road as she was leaving the house, saw her, but did not stop her. About a month afterwards she came over from Ireland, and tried to induce him to receive her as his wife. He refused, and promised to make some arrangement the next day; but on the following morning she got a letter from him to the effect that he did not wish to see or hear anything more of her, and that she might consider the separation which had taken place as final. Shortly after that she returned to Ireland. On the 26th of November, 1860, she got a letter from him—the last she received in that year—which speaks about a proposal with reference to living apart, but expresses no desire whatever for her return. On the 28th of May, 1861, a proposal was made by Mr. Tomlin, a friend of both parties, to bring them together, and they met at Tomlin's house; and whilst there, for the first time, she learnt that he had been carrying on an adulterous connection with another woman. She said what any woman might be expected to say: "As long as that connection continues, I am not willing to return." More than one proposal was afterwards made on the part of the wife to this effect: "If you will give up this connection, I am willing to listen to what you have to say, and it may be that I will return." No Court of law can say that a wife ought, still less that she was bound, to go back to her husband whilst he was carrying on an adulterous intercourse which would be ground for a separation. The only question therefore is, whether the husband's conduct before the wife became aware of the adulterous connection which he had formed constitutes desertion. I am clearly of opinion that it does. The breach was made by him and was kept open by him. There was no indisposition on the part of the wife to live with her husband, but he had evidently an intention that she should not live with him. When to these

circumstances are added the facts, that before and after the marriage he was intimate with Sarah Williams; nay, more, that he actually introduced that woman into the house where his wife was living at Tenby, and that he had two children by her, one born in May, 1861, and that the intimacy was continued constantly during the whole of 1860, the case becomes tolerably plain. In short, it appears that from the first the husband determined not to live with his wife. He neglected her, withdrew himself from her, refused her conjugal rights, did not even support her, but left her to pay the expenses of their joint cohabitation, and during all that time was carrying on an adulterous intercourse. I am of opinion that the respondent has been guilty of adultery, coupled with desertion for two years and upwards. There will therefore be a decree *nisi*, with costs.

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———
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GRIFFITH v. GRIFFITH.

February 16.

Answer to Suit for Restitution.—Pleading.—Practice.

———
GRIFFITH
v.
GRIFFITH.

The question for the Court is wholly different where a pleading is demurred to, and where it is moved to order the amendment or reformation of a pleading; in the latter case, it will consider what form is convenient in the circumstances, and whether the party applying is likely to be injured or obscured in his view of the case by the pleading as it stands, without prejudging the question of the sufficiency of the allegations if established in evidence.

This was a question arising on the following answer to the wife's petition for a decree of restitution of conjugal rights:—

1. That he denies that he withdrew himself from cohabitation with the said Justina Griffith, as set forth in the said petition, without lawful excuse.

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2. That from and after the date of his marriage, that is to say, the 23rd of September, 1854, up to the 18th of December, 1860, he has suffered in his health, in his business, in his character, and in his happiness, from the degrading, violent, and cruel treatment of the said Justina Griffith.

3. That at and after his said marriage, it was proper and prudent for him to live in apartments, and he did live with his said wife over or near the shop in which he carried on his business of a stationer; but the behaviour of his said wife was so improper and violent, that he was compelled to leave lodging after lodging, and to take a whole house, larger and more expensive than he required, and live and carry on his business in the same.

4. That after he had taken, and while he was carrying on his business in a house occupied entirely by himself, the conduct of his wife was so violent and improper that no respectable servant would stay in his family, so that even his shopmen have often been suddenly compelled to do the household work; and, in fact, in the space of two years and three months, the respondent had ten servants in succession, besides seven different charwomen.

5. That his said wife has frequently, during the period aforesaid, interfered with and prevented the business of the said shop, by swearing at and abusing the respondent therein, during the hours of business, so as to deter customers from coming in, and to collect crowds round the door, and has also sometimes come into the shop and sat there nursing the child, to the interruption of business, and at others sent the children into it during business hours, to be there taken care of by him the while she went out unnecessarily.

6. That his said wife has frequently, during the period aforesaid, assaulted and struck him, and threatened to do for him, and on one occasion kept back a knife before supper, and afterwards with violence threatened him with it.

7. That frequently, during the period aforesaid, his wife

has, without his permission, at times without his knowledge, at other times against his will, gone in the evening to places of bad repute, where dancing of loose and lewd persons of both sexes has been going on, and has danced and consorted with the persons there, and has stayed out till midnight.

8. That, during the period aforesaid, his wife has, against his will and despite his protest, associated with women of disreputable character, and men who were strangers to the respondent, and with some of the latter, whose names are respectively unknown to him, and at times and places unknown to him, committed adultery, as the respondent verily believes.

9. That while the respondent was carrying on a profitable business, which enabled him to support his wife and family, his life was rendered so wretched and uncomfortable by the behaviour of his said wife, that his health began to fail by reason of the agitation and distress of mind caused by such behaviour; and the respondent, fearing that his business would suffer and his creditors be injured, made an assignment for their benefit, and gave up his property to the assignees; but his said wife opposed the assignees in their endeavour to take possession of his business and property, and refused to leave the said house, and in consequence thereof they made him a bankrupt. Wherefore the respondent prays your Lordship to dismiss the said petition, etc.

Mr. W. Murray, on behalf of the petitioner, now moved to strike out the 3rd, 4th, 5th, 7th, and 9th paragraphs of the answer, and the words "without lawful excuse" in the 1st paragraph; to amend the 2nd and 6th, by stating more specifically the acts of cruelty relied on, and the 8th, by making a positive charge of adultery. Under the 1st paragraph, as it stands, any defence might be set up; it gives no information to the petitioner as to the nature of the case to be proved against her. As to the 3rd, 4th, 5th, 7th, and 9th, they con-

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1864. tain nothing which is admissible as answer to a suit for restitution of conjugal rights (*Burroughs v. Burroughs*, 2 Sw. & Tr. 303). From the 2nd and 6th paragraphs it may be gathered that the husband intends to charge the wife with cruelty; but much more specification is necessary. The 8th paragraph, unless it can be amended by a direct averment of adultery, must, it is submitted, be struck out.

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—
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Mr. Keane, Q.C.: The answer must be taken as a whole. The first paragraph is a traverse of an allegation in the petition; the paragraphs following the second give some detail of the degrading, violent, and cruel treatment, which the second states generally. It is not necessary that every paragraph of an answer should contain matter on which a decree of separation could be made (*Leete v. Leete*, 2 Sw. & Tr. 568). Particulars of acts of violence should have been asked for on summons.

THE JUDGE ORDINARY: It is very material to bear in mind that what the Court is asked to decide does not come before it on demurrer. But the discretion of the Court is appealed to, to direct the respondent to reform his answer; the Court has, therefore, to consider what form is most convenient, and to guard against the possibility of the party applying being injured or obscured in his view of the case by the answer as it stands. In some particulars I think this answer must be reformed. The first paragraph, as it stands, might enable a wholly different case to be set up from that which the rest of the answer indicates. The words "without lawful excuse" must come out. At the end of the second paragraph must be inserted "in manner hereinafter mentioned," or some equivalent; and in the eighth paragraph, "as the respondent verily believes," must be struck out. Subject to these alterations, I think the answer should stand; nothing leads to unnecessary expense so much as deciding cases on statements of facts

in pleadings. I am far from saying that if the respondent goes to trial he will have a case in answer to the petition. I do not wish to prejudge that point, or to enter into minute speculation at this stage of the case; and if I can see a reasonable probability of the sufficiency of the pleading, I will not interfere on motion.

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February 16.
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GILL v. GILL AND HOGG.

Dissolution of Marriage at Suit of Husband.—Alteration of Settlement.—Costs.—22 & 23 Vict. c. 61, s. 5.

1863.
November 24.
GILL
v.
GILL AND
HOGG.

When in a suit for dissolution of marriage the co-respondent is condemned in costs, he is liable for the costs of the petitioner and respondent incurred in obtaining an alteration of a marriage-settlement.

In this case, on the 20th of November, 1862, a decree *nisi* of dissolution of marriage on the ground of the wife's adultery was pronounced, and the co-respondent was condemned in costs.

On the 3rd of March, 1863, the decree was made absolute.

The petitioner afterwards presented a petition, under 22 & 23 Vict. c. 61, s. 5, for an alteration of the marriage-settlement.

The respondent opposed the application, and on the 23rd of June, Sir Cresswell Cresswell (Judge Ordinary) made an order altering the settlement,¹ and ordered that the re-

¹ The terms of the order were as follows:—"Order, that any money which under the covenant of Sir W. M. becomes payable to the respondent, shall be applied for the benefit of the child of the marriage, as Sir W. M. and the petitioner shall jointly think fit. That from and after the death of the petitioner, the trustees of the settlement shall

1864. December 1, *Mr. Karlake*, Q.C., and *Mr. A. S. Hill* showing
January 20. cause. From the order of the Judge Ordinary discharging
YEATMAN this rule the petitioner appealed to the Full Court.
v.
YEATMAN.

The petitioner, in person, appeared in support of the appeal. He submitted that a rule *nisi* having been granted, and the present appeal being from the refusal to make it absolute, the rule *nisi* must be taken to be still in existence, and the respondent should show cause.

THE JUDGE ORDINARY: Has notice been given to the other side?

Mr. Yeatman: Yes.

THE JUDGE ORDINARY: The Court is of opinion that on an appeal against the discharge of a rule, the respondent is properly brought into Court by notice, and the Court can deal now with the whole question, and either make the rule absolute or discharge it; but, as in all other cases of appeal, the appellant must begin.

The Judge's notes of evidence were then read by THE JUDGE ORDINARY, and the Court, after hearing the appellant, and without calling on *Mr. Karlake*, Q.C., and *Mr. A. S. Hill*, for the respondent, dismissed the appeal.

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HARRISON v. HARRISON.

HARRISON
v.
HARRISON.

Wife's Petition.—Unreasonable Delay.—31st section of the Divorce Act.

The wife finally left her husband in 1844, who had been guilty of cruelty and adultery; no subsequent acts of adultery were proved; till

shortly before the petition was filed, the wife had been without the means of proceeding in the Ecclesiastical or this Court; the husband had led a wandering life, without any regular employment.

Held, that the wife had not been guilty of unreasonable delay in presenting her petition.

1864.
February 2.
HARRISON
v.
HARRISON.

This was the wife's petition for dissolution of marriage by reason of adultery, cruelty, and desertion. The respondent did not appear.

The cause was heard before the Court on the 28th of January.

Dr. Spinks and *Mr. Searle* conducted the petitioner's case.

It appeared that the parties were married in 1822, the husband then occupying a small farm in Lincolnshire. He soon got into difficulties, and was obliged to give up the farm. He was of drunken and dissolute habits, and treated his wife so cruelly that in 1834 she separated from him. He had previously formed an adulterous connection with a girl in the service of his father. In 1844, on the respondent promising to amend, the petitioner went to live with him again; but after staying a few days, she found that he had infected her with a venereal disease, and she again left him and never returned to cohabitation. He had since led a vagabond life, occasionally employed as a drover, but without regular work or earnings. The petitioner had been supported partly by her family and partly by taking in needlework, and had no means of prosecuting a suit till she came into some property by the death of a brother in 1862.

THE JUDGE ORDINARY said he set his face against raking up old acts of cruelty and adultery to make a case of them. He was inclined to help the petitioner in the present case, but must take time to consider whether a decree ought to be made so long after the acts complained of.

Cur. adv. vult.

1864. **THE JUDGE ORDINARY:** In this case, the cruelty and adultery of the husband have been clearly established, and the question is, whether the Court should found a decree upon them, after so great a lapse of time from their commission. Delay is no bar to a suit of this sort; but it may, according to the circumstances of the case, lead the Court to the conclusion either of condonation or connivance, or of a want of sincerity in the suit. But here the delay is satisfactorily accounted for; the wife had no means to go to the Ecclesiastical Court before the passing of the Divorce Act, nor subsequently to come to this Court until a short time before the petition was presented. The husband appears to have been leading a vagabond life, with no fixed home, sometimes supporting himself as a drover, and sometimes by any chance employment he could obtain. Under such circumstances it would be a denial of justice to the wife to refuse a decree.

Decree nisi.

1863. **WELLS v. COTTAM** (falsely called Wells).
 Nov. 10 & 17. *Petition for Nullity by Father of Minor.—Parties to Suit.—*
 And *Liability to Costs.*
 1864.
 March 1.

WELLS
 v.
 COTTAM
 (falsely called
 Wells).

If the father of a minor petitions for a decree of nullity of his child's marriage, he must make the other party to the *de facto* marriage a party to the suit. In such a suit the *de facto* wife is not entitled to have her costs taxed against the petitioner, as in ordinary cases between husband and wife.

This was a question arising on a motion for an order to tax costs in a suit for nullity of marriage. The cause was entitled as above, and the petition was as follows:—

“The petition of William Henry Wells, of The Cedars, Putney, in the county of Surrey, the natural and lawful

“ father and guardian of George Henry Wells, a minor, 1863.
 “ showeth,—first, that on the 14th day of November, 1861, a Nov. 10 & 17.
 “ marriage after banns was in fact celebrated between the And
 “ said George Henry Wells, being then a minor of the age of 1864.
 “ eighteen years, and Martha Cottam, spinster, at the district March 1.
 “ parish church in the district parish of St. John the Baptist, —
 “ Hoxton, in the county of Middlesex. Secondly, that the WELLS
 “ said George Henry Wells and the said Martha Cottam v.
 “ having, for the purpose of concealing the said marriage COTTAM
 “ from your petitioner, caused the banns for the said marriage (falsely called
 “ to be published in the names of Henry Wells and Martha Wells).
 “ Cottam, notwithstanding that his true names were George
 “ Henry Wells, knowingly, wilfully, and fraudulently inter-
 “ married, on the said 14th day of November, 1861, without
 “ the due publication of banns.”

Prayer, to declare the *de facto* marriage null and void.

The answer, headed “ The respondent Martha Wells, in
 “ answer to the petition of William Henry Wells, the natural
 “ and lawful father and guardian of George Henry Wells, by
 “ William Cottam, her natural and lawful father and guardian,
 “ says,” traversed the fact of knowingly, wilfully, and fraudu-
 “ lently intermarrying, etc., and prayed for a declaration of the
 “ validity of the marriage.

On the 6th of November the cause was directed to be tried
 by a jury.

Dr. Wambey now moved the Court for an order that the
 respondent’s costs should be taxed against the petitioner.
 Whenever a fact of marriage is admitted or proved in a suit
 in the Matrimonial Court, the woman is entitled to have her
 costs taxed against the other party (*Bird v. Bird*, 1 Lee, 210;
Beavan (by his guardian) v. *Beavan*, 2 Sw. & Tr. 652).

It may be a question whether, in this suit, the *de facto*
 husband ought not to have been made a party, as in *Ray v.*
Sherwood and Ray, 1 Curt. 173.

1863. *Dr. Spinks*, for the petitioner: Here the father of a minor
 Nov. 10 & 17. petitions, in his own right, for sentence of nullity of his son's
 And *de facto* marriage. He is not within the general rule, which
 1864. makes the husband liable for the wife's costs, and, from the
 March 1. cases, it would seem that to suits for nullity that general rule
 ——— does not apply, and that the Court will deal with the question
 WELLS of costs, at the end of the suit, in such way as the conduct
 v. of the parties may call for. In *Aughtie v. Aughtie*, 1 Phill.
 COTTAM 203, a marriage was annulled by reason of affinity at the suit
 (falsely called of the *de facto* wife, but no costs given, the parties being very
 Wells). much *in pari delicto*. In *Fellowes v. Stewart*, 2 Phill. 260, the
 Court, at the conclusion of the cause, gave costs against the
de facto husband. In *Brown v. Brown*, 2 Rob. 302, the
 guardian of a minor wife was condemned in costs. In an
Anon. case, Deane, 299, Dr. Lushington said, "If either
 "party, cognisant of disability, married, the Courts have con-
 "sidered the so doing such a wrongful act that they have con-
 "demned the party in costs."¹

Cur. adv. vult.

November 17. THE JUDGE ORDINARY: In this case application was made
 for the wife's costs to be taxed, in the usual way, against the
 petitioner. Upon investigation, I think the form of proceed-
 ing is altogether irregular. There are two forms of suit known
 to this Court to obtain a decree of nullity of marriage cele-
 brated by minors. The minor, through his father, as guardian,
 may petition, or the father may sue in his own right and inter-
 est, as in *Ray v. Sherwood and Ray*. This suit is in neither
 form. The second irregularity is, that the wife, a minor, having

¹ See *Portsmouth v. Portsmouth*, 3 Add. 63, and, for the conclusion
 of the cause, 1 Hagg. 374. The Ecclesiastical Court has held that it
 could not allot alimony until a fact of marriage was either proved
 against, or admitted by, the husband (*Smyth v. Smyth*, 2 Add. 254);
 but see rule 25 of the original rules of the Court, and those dated
 11th January, 1860.

been cited, appears by guardian, though there has been no election of guardian, nor any order in the registry appointing any one as *curator ad litem*. Till the suit is put into some form known to the Court, the question as to costs cannot be decided. If the father intends to proceed in his own right, his description as "guardian" must come out, and he must then cite his son as well as the *de facto* wife. I hold, on principle, that in such cases the petitioner must cite both the parties.

1863.
Nov. 10 & 17.
And
1864.
March 1.
—
WELLS
v.
COTTAM
(falsely called
Wells).

Dr. Spinks: The petitioner intended to sue in his own right, and the ambiguity created by the insertion of the word "guardian" shall be removed. As to the son not being cited, such citation was refused in the registry.

THE JUDGE ORDINARY: I think it must issue.

Subsequently, the following order was made on summons on the 15th of December:—"Upon hearing counsel on both sides, I do order that the petitioner be at liberty to proceed in this cause as the natural and lawful father of George Henry Wells, to cite the said George Henry Wells to answer the petition in this cause; and that as against Martha Cottam (otherwise Wells), the respondent, the petitioner be allowed to proceed in this cause as if she had not entered an appearance to the citation served upon her or filed an answer to the said petition, unless she shall, within fourteen days after the service of this order, duly elect a curator or guardian for the purposes of this suit; and the said curator or guardian shall then forthwith enter an appearance to the said citation, and file an answer to the said petition on behalf of the said Martha Cottam (otherwise Wells); and further order, that the said Martha Cottam (otherwise Wells) shall be at liberty to proceed in this suit by her curator or guardian, without liability to the costs incurred in this cause by the petitioner."

1863. The *de facto* wife having appeared by William Cottam, her
 Nov. 10 & 17. father, as her guardian, the proceedings amended accordingly,
 And
 1864. and the cause entitled *Wells v. Wells and Wells*.

March 1.

WELLS
 v.
 COTTAM
 (falsely called
 Wells).

On March 1, *Dr. Wambey* moved to have the wife's costs taxed against the petitioner.

Dr. Spinks, on behalf of petitioner, *contra*.

THE JUDGE ORDINARY: I am of opinion that there is no authority for this application; nor does it appear warranted by the principles put forward. In the more ordinary suits in this Court, the husband, whether petitioner or respondent, is supposed to have all the property, and therefore is liable to have the wife's costs taxed against him; but this rule has no application where a third person is suing both husband and wife,—a case common enough in the Common Law Courts. Nor do I think that there is anything in this particular case to call for the extension of the particular rule of this Court. From the affidavits it is clear that the husband is not colluding with his father, the petitioner.

1864.

(Before THE JUDGE ORDINARY, in Chambers and on Motion.)

January 16,
 February 23,
 and March 1.

CODRINGTON v. CODRINGTON AND ANDERSON.

CODRINGTON
 v.
 CODRINGTON
 AND
 ANDERSON.

Husband's Petition.—General Charge.—Particulars.—Evidence.—Co-respondent.

In answer to an order for particulars of a general charge of adultery, the petitioner gave the name of M., as the alleged adulterer, in respect of such general charge. On application for further particulars

of time and place, it was stated that the petitioner depended on written admissions of the wife as to this charge, and the Judge Ordinary ordered that if particulars were not given to the respondent's attorney earlier than ten days before the trial, the petitioner should be confined to documentary evidence. Issue being joined, and directions as to the mode of trial taken, the respondent applied for and obtained a commission to examine M., then in India, as a material witness; the petitioner then moved to amend his petition by making M. second co-respondent, but the Court refused, holding that in the circumstances of the case the application was not *bond fide*, but with a view to shut M.'s mouth after the petitioner knew of the respondent's intention to examine him as a witness.

SEMPLE, if M. had himself applied to be made a co-respondent, so as to enable him to take part in the suit, the Court would have granted the application.

This was the husband's petition for dissolution of marriage. The third paragraph was as follows:—"That on divers occasions since the 1st day of April, 1859, the said H. J. Codrington (the respondent) has committed adultery with "divers persons." An order for the particulars of the adultery charged in this paragraph having been made on the application of the respondent, the petitioner delivered particulars, in which he alleged that the respondent had committed frequent acts of adultery between 1859 and 1862 with one Lieutenant Mildmay, at Malta, and during a journey in Switzerland, Savoy, Sardinia, and Italy. Application was made on summons for further and better particulars, and it appearing that the information on which the charge was founded was contained in a diary and certain letters of the respondent which had come to the petitioner's hands, the following order was made in chambers:—"Unless the attorney "for the petitioner do, not later than the tenth day before the "trial of this cause, deliver to the attorney for the respondent "further and better particulars of the acts of adultery alleged "in the third paragraph of the petition, by setting out the "dates and occasions of the adultery charged to have been

1864.

January 16,
February 23,
and March 1.

CODRINGTON

v.

CODRINGTON
AND
ANDERSON.

1864. "committed by the respondent with Lieut. Henry St. John
 January 16, "Mildmay, at Malta, and also as to the occasions and places
 February 23, "of adultery charged during the journey to Switzerland,
 and March 1. "Savoy, Sardinia, and Italy, the petitioner be precluded at
 CODRINGTON "the trial of this cause from offering any save documentary
 v. "evidence in support of the said third paragraph of the said
 CODRINGTON "petition."
 AND
 ANDERSON.

The respondent then traversed the allegations of the petition charging adultery, and on the 9th of February the case was directed to be tried before the Court and a special jury.

February 23. *Mr. Searle* moved, on the usual affidavits, on behalf of the respondent for a commission to examine Lieut. Mildmay, who was stated to be in the Punjaub in India.

Dr. Spinks, contra: The application must be to delay and harass the petitioner. The evidence of a man in Lieut. Mildmay's position can be of little real value.

THE JUDGE ORDINARY: I think I cannot in justice refuse the commission, but you may take three days on behalf of the petitioner to consider whether you abandon the third paragraph of the petition.

March 1. *Dr. Spinks*, for the petitioner, moved to amend the petition by making Lieut. Mildmay a co-respondent.

Mr. Inderwick, contra: It has been considered that the 28th section of the Divorce Act is sufficiently complied with if one co-respondent is made. The present motion is obviously with the view to defeat the respondent's expressed intention to examine Lieut. Mildmay as a witness.

THE JUDGE ORDINARY: The position of men charged with adultery by the husband in his petition for dissolution is most

anomalous : if made a co-respondent, as one, generally speaking, must be, his mouth is shut, but he may appear by counsel and take part in the trial of the case ; if not made a co-respondent he can take no part in the trial, but may be called as a witness, if the other parties choose. One co-respondent was originally made on this petition, and there was a general allegation of adultery besides ; of this particulars were asked, when Lieut. Mildmay's name was given, with a very general statement as to time and place. On application for further particulars, it was stated that the petitioner could not give any, as his proof consisted of written admissions by the wife. I directed that particulars, if discovered, should be given, but that if none such were given by ten days before the trial, then the petitioner should be restricted to documentary evidence. Directions as to mode of trial were then taken, and a commission to examine Lieut. Mildmay in India asked for ; on this being granted, the petitioner now asks to make him a co-respondent. I cannot help seeing that this application is made with the object of shutting his mouth. One object of the section I take to be to protect the alleged adulterer. In this case, if Lieut. Mildmay had applied to be made a co-respondent, I should, as at present advised, have allowed him to take part in the suit in that character ; but here the petitioner asks, as I think, without *bona fides*, and I shall reject the motion.

1864.

January 16,
February 23,
and March 1.CODRINGTON
v.
CODRINGTON
AND
ANDERSON.

1864.

March 1 and 8.

STONE v. STONE AND BROWNRIGG.

STONE
v.
STONE AND
BROWNRIGG.

*Settlements.—Money in Possession or Reversion.—22 & 23 Vict.
c. 61, s. 5.—Costs.*

An interest under a marriage-settlement which may never be realized is not property in "reversion," within the 45th section of the Divorce Act.

SEMPLE, moneys settled in the hands of the trustees of a separation-deed between husband and wife might be dealt with under 22 & 23 Vict. c. 61, s. 5.

The co-respondent is liable to costs of a successful application to deal with property under settlement; but if part of such an application fails, and the costs of that part can be separated from the other costs, they ought not to be thrown on the co-respondent.

This was an application to deal with a post-nuptial settlement, in respect of which no difficulty arose. The petition further stated that the respondent was entitled, under the marriage-settlement of her father, to £1000, or some other considerable sum of money; that previous to the petition for dissolution of marriage, a separation-deed was entered into between the petitioner and respondent, which, amongst other matters, recited that certain sums of money (other than those affected by the post-nuptial settlement) had come into the hands of the petitioner in right of his wife, and were then represented by £1000 Caledonian Railway Stock standing in their joint names; this stock they covenanted to transfer to the trustees named in the separation-deed on certain trusts ultimately for the benefit of the children of the marriage. The separation-deed contained a stipulation that, in case a dissolution of the marriage were obtained, the trusts under the deed should be null and void. In due time after the decree of dissolution, the respondent and co-respondent intermarried, and the trustees of the separation-deed, to whom the £1000 stock had been transferred, had sold it, and paid the proceeds to the respondent.

The Queen's Advocate (Dr. Swabey with him), on behalf of the petitioner, now asked the Court either to make some order in respect of the £1000 stock for the benefit of the children of the marriage, treating it as a post-nuptial settlement, and so within the scope of 22 & 23 Vict. c. 61, s. 5; or to order the interest of the respondent under her father's marriage-settlement to be settled for the benefit of the children of the marriage under the 45th section of the Divorce Act, which enables the Court to deal with the property of the wife either in possession or reversion; and to condemn the co-respondent in the costs.

1864.

March 1 and 8.

STONE

v.

STONE AND
BROWNEIGG.

March 1.

*Cur. adv. vult.**Mr. Karlake, Q.C., contra.*

THE JUDGE ORDINARY: This was an application after a decree of dissolution to deal with certain sums of money. As regards the first sum, which consisted of the petitioner's own money brought into settlement, there will be no difficulty in directing that the settlement should be read as if the respondent were naturally dead; but to the other part of the application very different principles apply. The 45th section enables the Court, where a decree of dissolution is made by reason of the wife's adultery, to deal with her property in possession or reversion; these are well-known legal terms. On looking at the marriage-settlement, under which, it is said, the respondent has a reversionary interest, it appears that she may never have any share of the moneys settled; she cannot therefore be said to have any property in reversion, and I have no power to deal with her interest, whatever it may be. Then as to the £1000 Caledonian Stock, is that, as described in the petition, within the 5th section of the Amendment Act? I am not prepared to say that the separation-deed was not a post-nuptial settlement within the meaning of that section; undoubtedly property was settled, and I think the section should be liberally construed. But the settlement

March 8.

1864. was made on certain conditions, namely, that its trusts should
 March 8. be at an end in case of a decree of dissolution, which
 seems to have been then contemplated by the parties, and
 which has since occurred. There is therefore now no settle-
 STONE ment with which I can deal. If the trustees have wrongfully
 v.
 STONE AND sold the stock, and handed the proceeds to the respondent,
 BROWNEIGG. the remedy against them must be sought elsewhere. The
 co-respondent must pay the costs as regards the first part of
 the application which has been granted; but if the costs as
 regards that part of the application which has failed can
 be separated from the other, these ought not to be cast on
 the co-respondent.

March 8 & 15.

COOKE v. COOKE.

COOKE
 v.
 COOKE.

*Wife's Petition by Reason of Cruelty.—Taxed Costs.—Items
 disallowed.*

The Court will not interfere with the discretion of the Registrar in respect of particular items allowed or disallowed on taxation, unless it can be shown that the taxation proceeded on an erroneous principle.

This was originally the wife's suit for judicial separation by reason of the husband's cruelty, in which she obtained a decree, and her costs had been taxed against the husband.

On the 8th of March, *Dr. Spinks* moved the Court to order the registrar to review certain items of the wife's costs (specified in the Registrar's report hereunder), which had been disallowed on taxation as against the husband.

Cur. adv. vult.

On the 17th of March, the sitting registrar, by direction of the Judge Ordinary, read the following report from the registrar who taxed the bill of costs:—

1864.

March 8 & 15.

COOKE

v.

COOKE.

The further bill of costs of the petitioner, filed 11th of January, 1864, was taxed according to usual practice as between party and party, and in the presence of the agents of petitioner and respondent, on the 8th of February, 1864.

1. Instructions to counsel to advise on answer. Never allowed. The counsel has a copy of the petition and answer, and no further instructions are held to be necessary for the purpose of enabling him to advise as to the sufficiency of answer.

2. Journey to Seamer and thence to Bilderstone and other places for the purpose of getting evidence in support of petition for custody of children and expenses. The only affidavits filed in support of this petition were those of the petitioner and her two daughters (both of whom were resident in London), and of Emily Butcher, resident at Bilderstone, therefore the journey of the agent proved useless, except for the purpose of procuring this last affidavit. It is unusual when a case is heard upon affidavits to allow more than 6s. 8d. for instructions for each affidavit, and in case the deponent resides at a distance, the expense of employing an agent on the spot to read over and settle the affidavit with the deponent, and to have her sworn. These expenses are allowed in pages 2 and 3 of the bill as regards the affidavit of E. Butcher; and there being no other evidence used on the motion for custody of children to which the journey in question could apply, the expenses of the same were disallowed.

3. Instructions and fee to counsel to settle affidavits, and advise if sufficient. It is contrary to the usual practice to allow for settlement of affidavits by counsel or advice as to their sufficiency.

4 and 5. Drawing and copying observations for counsel on motion for custody of children, and on motion for alimony.

1864. The only allowance made for motions, according to usual
March 8 & 15. practice, is for a case or statement for the Court, which, if
COOKE not necessarily exceeding seven folios in length, is by the
v. table of fees limited to 10s., and for a copy of that case or
COOKE. statement, and of all documents referred to in it, for counsel.
Observations in addition to those in the case for motion are
therefore disallowed.

6. Attending in Court, 21st of April, 1863, when motion for alimony was directed to stand over. This motion was for an order for permanent alimony, and it appears by the minutes that it was directed to stand over until the appeal had been determined. The notice of the appeal had been served on the petitioner and filed in the registry on the 9th of March, 1863, and as no order for permanent alimony could be made pending the appeal, and the motion was therefore premature, the attendance was disallowed.

7. Attending in Court, 21st of April, 1863, on motion for custody of children. This motion was also directed to stand over until the appeal had been determined, and being premature, the attendance was disallowed.

8. Conference with Dr. Spinks, when he advised that petitioner might safely go to hearing on the present evidence and his fee. No conference with, or advice of counsel as to sufficiency of affidavits in support of a motion is usually allowed on taxation between party and party, and as it did not appear that there was any necessity for this conference to except it from the usual practice, it was disallowed.

9. Conference with Dr. Spinks, when he advised a motion for an interim order for access to children, and motion for same. This motion, 30th of June, 1863, failed. It appears by the minutes that the judge refused to make any order. Under these circumstances, all expenses of the motion and of the advice which led to it were disallowed as against the respondent. The adjourned motion for custody of children was afterwards (8th of July) heard, and an order made upon it,

but the expenses of that motion are fully allowed for when it was first brought on (see page 4 of the bill), except the attendance in court of the practitioner, which is allowed for on the 8th of July (page 7 of the bill). 1864. March 8 & 15.

COOKE
v.
COOKE.

10. Attendance in Court and refresher to counsel on adjourned motion for custody of children, 14th of July, 1863. This appeared to be a renewal of the adjourned motion, which had in fact been disposed of on the 8th of July; but whether the object of it was to procure any alteration of the order then made, or any additional order, it failed, as the judge refused to make any order on the application, and therefore the attendance and refresher were disallowed.

11. Refresher to counsel on renewing motion for alimony. This motion was premature when originally made. If the fee to counsel had been paid when the motion could properly have been disposed of,—namely, after the decision on the appeal on the 8th of July, no refresher would have been payable, therefore it was disallowed.

12. Observations for counsel and conference on renewal of motion for alimony. Nothing had occurred to affect the motion for permanent alimony in the interval since the adjournment of it. And these expenses were therefore disallowed.

Motions for permanent alimony:—

21st of April, 1863.—Ordered to stand over until appeal had been determined.

14th of July, 1863.—Order postponed.

Motions for access to and custody of children:—

21st of April, 1863.—Ordered to stand over until appeal had been determined.

30th of June, 1863.—No order.

8th of July, 1863.—Ordered, that the petitioner have the custody of her youngest child.

14th of July, 1863.—No order.

CHARLES J. MIDDLETON, *Registrar*.

1864. THE JUDGE ORDINARY said: I see no need to interfere
 March 8 & 15. with the taxation of the registrar in this case, and I must take
 COOKE the opportunity of saying, that it is an inconvenient and un-
 COOKE usual course to bring before the Court certain items dealt
 with on taxation of costs, unless it can be pointed out that
 the principle upon which the taxation proceeded is wrong.

January 16.

BREMNER v. BREMNER AND BRETT.

BREMNER
 v.
 BREMNER
 AND BRETT.

Alimony.—Practice.—Attachment.—Costs.

Where there was a balance due from the petitioner (the husband) for alimony and costs, and there had been an arrangement between the parties that the balance should be paid by monthly instalments of £20, and that an attachment should be granted against him to remain in the registry until he made default in payment of one of the instalments, the Court dismissed the petition, and decreed an attachment on the terms arranged.

The Court has power to enforce an attachment after the suit has been dismissed.

Where the co-respondent is found to have been guilty of adultery, he is not, as a matter of course, relieved from payment of the costs of that issue, merely by reason of the husband having been guilty of such adultery as to induce the Court to dismiss the petition.

In this case the husband had petitioned for a dissolution of his marriage by reason of his wife's adultery with the co-respondent. The respondent and co-respondent had filed answers denying the adultery, and the respondent had also recriminated adultery. The questions at issue were tried before the late Judge Ordinary and a common jury in July, 1863, when the jury found that the respondent had been guilty of adultery with the co-respondent, and also that the petitioner had been guilty of adultery. There was a balance

due from the petitioner to the respondent for alimony *pendente lite*, and also to her proctors for costs in the suit. On December 16, there was a motion for attachment against him for non-payment of this balance; in answer to which the petitioner filed an affidavit, stating his inability to pay the whole sum at once. The Court directed the motion to stand over.

1864.
January 16.
BREMNER
v.
BREMNER
AND BRETT.

Dr. Spinks, for the petitioner, moved the Court to dismiss the petition. It had been arranged between the parties that an attachment should be granted, but that it was to remain in the registry until the petitioner should make default in payment of the £20 per month in liquidation of the sums due for alimony and costs.

THE JUDGE ORDINARY: I have read the judge's notes of the evidence taken at the trial; and the adultery proved against the husband is not of that character that would induce me to say that the petition ought not to be dismissed.

Mr. W. G. Harrison, for the respondent, asked that the petition should be dismissed conditionally, on the payment of costs and alimony due. If it is dismissed unconditionally, the Court will not have power to enforce payment of alimony and costs.

Dr. Spinks: There is nothing to prevent the Court from enforcing a compliance with its orders after the petition has been dismissed.

THE JUDGE ORDINARY: I will dismiss the petition to-day. This will not prevent the Court from afterwards enforcing payment of the sums due by attachment. I will decree an attachment. It must lie in the registry, and is not to issue until the petitioner shall have made default in the payment of

1864. £20 per month for the balance due for alimony, and for the
January 16. wife's costs up to the present time.

BREMNER
v.
BREMNER
AND BRETT.

Dr. Spinks asked the Court to condemn the co-respondent in the costs of the issue found against the respondent. By sect. 34 of the Divorce Act, it was in the discretion of the Court to make such order as to costs as it should think fit.

Dr. Swabey: There is no instance of the Court condemning the co-respondent in any part of the costs when it dismissed the petition. The contrary has been the practice (see *Seddon v. Seddon and Doyle*, 2 Sw. & Tr. 640).

THE JUDGE ORDINARY: There are expressions at the commencement of the judgment in *Seddon v. Seddon and Doyle*, showing that the husband in that case had been very grossly in fault, which would distinguish it from the present case. My own opinion is, that when a jury has found a verdict of adultery against a co-respondent, he is primarily liable for costs, and that he ought not to be relieved from the payment of them, merely because the husband has been guilty of adultery with another woman. It seems to me that the petitioner in this case is entitled to the costs asked for. I condemn the co-respondent in such costs as were incurred by the husband in respect of the issue of adultery found in his favour.

(Before THE JUDGE ORDINARY.)

February 9.

WINSKOM

v.

WINSKOM
AND FLOWDEN.

WINSKOM v. WINSKOM AND FLOWDEN.

Husband's Petition.—Adultery condoned.—Subsequent Misconduct.—Evidence.

SEMBLE, condoned adultery may be revived, so as to found a sentence

of dissolution, by subsequent misconduct and improprieties, short of, but tending to adultery.

A charge of adultery not sustained by the evidence.

1864.

February 9.

WINSCOM

v.

WINSCOM

AND PLOWDEN.

This was the husband's petition for dissolution of marriage.

The petition alleged marriage on the 15th of February, 1849; cohabitation at various places in India and England, and the birth of one child. The third and fourth paragraphs stated—
3. That in or about the year 1853, the respondent, at Jubbulpour, had sexual intercourse with some man other than your petitioner, and thereby committed adultery.¹ 4. That in and during the months of February, March, April, and May, 1861, the respondent, without the knowledge of the petitioner, had frequent clandestine meetings at night with F. D. Plowden in and near to the grounds belonging to your petitioner's then residence at Palmacottah, and in the said residence at Palmacottah, and on divers of such occasions, committed adultery with the said F. D. Plowden. The respondent traversed both the charges of adultery and pleaded condonation. The petitioner's replication traversed the condonation, and alleged that the adultery charged in the third paragraph of the petition had been revived by the subsequent misconduct and adultery of the respondent in the fourth paragraph alleged. The rejoinder took issue. The co-respondent denied the adultery, and pleaded condonation. The replication took issue.

The case was heard by the Court itself on the 3rd and 4th of February, 1864.

Mr. Karlake, Q.C., Dr. Spinks, and Dr. Tristram for the petitioner.

¹ Upon this paragraph the respondent obtained an order on summons for particulars of the acts of adultery therein alleged. The particulars delivered were acts of adultery committed with Lieutenant (now Major) Edward Clark, of the 4th Madras Light Cavalry, at Jubbulpour, in February or March, 1853.

1864. *The Queen's Advocate* (Sir R. J. Phillimore), *Mr. Hawkins*,
February 9. Q.C., and *Mr. G. Francis* for the respondent.

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Mr. Coleridge, Q.C., and *Dr. Swabey* for the co-respondent.
As to the adultery alleged in the third paragraph, evidence was given of admissions made by the respondent, and a passage in one of her letters was also relied on. Besides the correspondence between the petitioner and his wife, referred to in the judgment, a correspondence between the petitioner and the co-respondent was put in evidence, in which the latter admitted that an undue intimacy had subsisted between himself and the respondent, but did not in terms either deny or admit adultery. The other evidence given on behalf of the petitioner is sufficiently noticed in the judgment.

Cur. adv. vult.

THE JUDGE ORDINARY: In this case the really material question is, whether the adultery alleged to have taken place at Palnacottah, in India, between the respondent and co-respondent, is satisfactorily established. That great (and improper) intimacy sprang up between these parties during the petitioner's absence in the spring of the year 1861, is plainly proved. The evidence of Augusta Morrison shows that they used to walk in the high road together in the evenings after dark, and the candour of the respondent herself has added to this the familiarity of kissing each other on more than one occasion. On the 13th or 14th of May, 1861, a disclosure of this intimacy was made to the petitioner by Augusta Morrison. He did what an honourable and just man would do. He declined for some days to sleep with his wife. He investigated the facts as far as he could; he asked questions of the nurse, and talked the whole matter over with his friend Colonel Middleton. The result was, that both gentlemen came to the conclusion that though great impropriety had been committed, still there was no adultery. The petitioner then made

the co-respondent promise not to speak to his wife again, and resumed cohabitation with her. He continued from that time to cohabit with her, sleeping in the same bed for upwards of a month. I think it right to pause here, and remark, that if the petitioner had taken a different course, he might probably have entitled himself to relief from the Court; for it is alleged that his wife had, in 1853, been guilty of adultery with a person named Clark, which he had condoned. We know nothing of the circumstances, and the fact is proved only by implication. But condonation would hardly have been an answer to a suit founded on that adultery in the face of these familiarities with Lieutenant Plowden, had he not condoned them also. It is not necessary to decide the point; but, as at present advised, I am of opinion that this latter misconduct would have enured to revive the original guilt, if that had been made out to the satisfaction of the Court.

I pursue the course of events. The petitioner determined to remove his wife to Aden as a temporary measure.¹ He accompanied her as far as Point de Galle, in Ceylon, staying at his friends' houses on the way, and parting with her in terms of strong affection. Whilst at Aden, where the respondent remained for six or seven months, a correspondence² took place,

1864.

February 9.

WINSCOM

v.

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¹ This was consequent on a discovery made by the petitioner that the respondent (who had promised him on his resuming cohabitation with her never again to communicate with the co-respondent) had subsequently written to him.

² December 15, 1863. *Dr. Wambey* moved the Court for an order to inspect the letters written by the respondent to the petitioner in the years 1861, 1862, and 1863.

Dr. Spinks and *Dr. Tristram*, *contra*: The letters of the respondent may be made evidence against her, but she cannot make them evidence to prop up her own case. The application is a fishing application, to ascertain what case the petitioner may be able to make out against her (see 2 Chitty's 'Archbold Practice,' 10th ed., 1869), and ought therefore to be rejected.

Dr. Wambey, in reply: The respondent is entitled to put in evidence

1864. which has been studied at great length by the Court. The
 February 9. burden of the petitioner's letters seems to be as follows:—"I
 WINSOM "still love you, and long for your love. I will summon you
 v. "to rejoin me on one condition, that of *true religious repent-*
 WINSOM "ance. Go to my sister in England; she will help you to
 AND PLOWDEN. "repent. You have never loved me, and are ungrateful for
 "my past leniency." The tone of these letters is that of very
 stern reproach, mixed with much religious exhortation, equally
 stern. Mere penitence will not suffice. His wife is to "abhor
 "herself in dust and ashes." She is to undergo deep humili-
 ation and self-abasement before her repentance can be real.
 But there is a strong yearning for her affection, and in the
 earlier letters an evident wish to satisfy himself that he might
 take her back with safety.

On the side of the wife, the letters may be thus epitomized:—"I won't pretend to an amount of religious feeling
 "which I don't entertain. I can never sympathize with what
 "I consider the extreme views of yourself and your sister in
 "matters of religion. Still, I am most truly sorry. I am but
 "a sinful, wicked woman; but I do sincerely repent of past

the petitioner's letters, and to call for her letters to which they are in answer. In this way she may make them evidence.

THE JUDGE ORDINARY: The letters written by the respondent must be filed in the registry, in order that the Court may see them, and judge whether the respondent is entitled to inspect them; or the petitioner must file an affidavit, showing that they are not in his possession.

December 23rd. The Judge Ordinary made the following order:—

The Judge Ordinary having deliberated, ordered that the respondent be permitted to inspect, in the registry, the original letters written by herself to the petitioner, such letters having been brought into the registry in obedience to an order of the Court, dated the 15th of December instant, and that the respondent be permitted to take copies of such letters, or so many of them as she may select.

On January 19, 1864, a similar order was made on the respondent, in reference to the letters written by the petitioner to her during the years 1861 and 1862.

" misconduct. Pray take me back to live with you. I feel 1864.
 " more true longing for your society than ever. But I make February 9.
 " no pretences; you must take me, if at all, as a weak, WINSOM
 " sinful woman, who will try hard to do all you wish, and WINSOM
 " who earnestly repents conduct which she now sees in its AND FLOWDEN.
 " true light."

Complete submission, absolute prostration before her husband's will, and tender entreaty, on the one side; reiterated reproaches, bitter words, an austere and uncompromising censure, on the other; with a vast amount of religious allusion on both sides—these are the principal features of this most distressing correspondence. It came to a cruel end. For six or seven months had the hope of being received again been held before the eyes of the wife. In December that hope appeared to be realized. The husband wrote letters which, as interpreted by himself, actually offered her the option of return to his home. She misunderstood them, and waited for a more sure welcome. Then came the letter of the 31st of December. It was a final blow to all for which the wife had yearned, an explicit withdrawal of all that had been held out to her. What was the true reason of the change? His next letter, of the 20th of January, 1862, explains it:—"Your letter of the 26th spoke volumes of the total unfitness you possess to rejoin me, and now I must request you to take this letter as final. Go home." But on referring to that letter, the Court looks in vain for words to justify such a reception or character. "I try to keep myself," says the wife, "from thinking of the coming mail, and pray to be resigned. From the softened tone in which you have written to me lately, I feel sure God has heard my prayer, and it is an encouragement." And again, in her next letter of the 5th of December, probably also received before the 20th of January:—"I pray God with the deepest earnestness to permit me to return to my husband and protector, if he sees fit, but I try to leave it entirely in his hands." There is no-

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thing here to induce the change of feeling which had now possessed itself of the petitioner's mind. Driven from this explanation, and forced to conclude that the reason put forward by the petitioner was hardly the real one, the Court looks in another direction. The letter of the 20th of January, 1862, goes on to say :—" I am willing to believe that you " have some desire to do your duty and atone for the past ; " and, because I believe this, I will just take at present no " further steps towards procuring a divorce, which would " render your conduct public. I will tell you I have taken " the opinion of one of the best lawyers in the Divorce Court, " and he is of opinion that I can get a divorce on the ground " of adultery with Lieut. Plowden, for though that cannot " be proved, adultery with Major Clark can ; and if I prove " that you were in the habit of meeting Plowden at night, " and that familiar intercourse, such as kissing, etc., existed, " that you had the opportunity of committing adultery, then " the Court would consider the condonation of adultery with " Clark cancelled, and that would revive ; and that, in con- " junction with your behaviour with Plowden, would be taken " as actual adultery committed with Plowden, for not having " scrupled to commit adultery with Clark, it is not to be sup- " posed that you would scruple to do so with Plowden. And " I can prove that Plowden is not a man likely to scruple to " do so with you, both from hospital returns of sickness and " from sentiments expressed by him at mess. All this I knew " when I promised you on the 21st of December in my letters " from Virduputti to receive you back."

This solves the difficulty. " I have taken the opinion," etc. The petitioner had communicated with England for advice as to his legal rights. He had learned for the first time that the full charge of adultery could be legally brought home to his wife ; whether he had really learned this as early as he says may be doubted. He did not, however, believe the fact of adultery himself ; it is his case in this Court that he did not, and

necessarily so, for its doors would otherwise be closed by his own condonation, and the Court gives entire credence to that denial. Now it is somewhat painful to reflect that the communication with England which produced this legal opinion must probably have passed contemporaneously with his urgent entreaties to his wife to repent and make herself fit to return to him; so that, while holding out to her the hope of return, he was consulting others as to his power to put her from him. Would that the legal opinion had never been asked or given! Relying on his own judgment, and obeying the dictates of his affection, all most probably would have been well. But the possibility of divorce opened new views, and this suit is the result. The petitioner, no doubt, assigns a far different reason. He says that, after he came to England, he first learned of the two occasions when his wife went to the gate in her dressing-gown. And it is argued that the condonation in India only extended to what the petitioner then knew—that he did not then believe in adultery, and did not therefore condone it; but that this additional evidence, if true, completed the case against his wife, and made adultery the only reasonable conclusion. This contention is open to many difficulties.

But, first, is it true that the nurse withheld this information from the petitioner in May, when she told him all the rest? The date she gives to the first of these meetings is two or three days before the 14th of May. The second was after that, and also before the 14th of May. On the 13th of May, which thus must have been immediately upon the occurrence of these meetings, she executed what she had before threatened, and exposed Mrs. Winscom's conduct to her husband. Is it likely that she would keep back all mention of the very meetings which had thus brought about the climax and induced her to break silence? But what was the petitioner's conduct when thus told? The nurse says, "That very evening he "went out about ten o'clock from the house. She was going "to undress;" and she then describes that he went to the

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gate, found Plowden there, and came back and charged his wife. Now, what induced him to go out that night? Would the knowledge that she used to meet Plowden while he was away from home account for it, or does his conduct point to a knowledge that these meetings had continued since his return, and at about the time for their retirement for the night? This is the first difficulty. But, again, does the nurse tell us the whole truth? The fact of Plowden being found at the spot on the night of the 13th is strong to show that there was some truth in the story, in reference to the two previous nights. But is it the whole truth? Did the servant who had threatened to tell her master before, and who certainly told him a day after, really shut down the window and refuse to see what became of her mistress after she got to the gate? And this not on one occasion, but on two succeeding nights? Or did she stay where she was, and see her mistress return after a few minutes, or remain in sight talking to Plowden till her return, as on former occasions? These are momentous questions, for it is this abrupt ending of the nurse's account of these nights which gives them their sting and significance. She conducts the wife to the gate and then leaves her open to every charge, and subject to the worst interpretations. It is this shutting down of the window that creates the cloud of doubt, mystery, and suspicion, in which the dishonour of the husband is said to stand revealed.

The Court cannot think this testimony natural or reliable, and here is a second and graver difficulty; but it is not the last. For, suppose it all true, is adultery thereby clearly or with reasonable certainty established? That there was a most improper intimacy is not denied; that it had already proceeded so far as evening meetings at the gate, and some personal, though not indecent liberties, is also admitted. What is there in the character of the two meetings now under discussion essentially different from the previous familiarities from which the petitioner himself drew no such conclusion? All is to

be surmised; nothing is proved. Whether she found Plowden at the gate when she went (as no doubt she expected), whether they were together one minute or an hour, whether they passed the time (whatever it was) at the gate, or walking on the road as on former occasions, or elsewhere—duration of time, place, and even the presence of the paramour; none of these are in proof, all in the region of suspicion.

Can the Court reasonably condemn the wife upon such materials? But, then, the wife's dress. To a suspicious mind it would seem to have been studiously adopted to favour the worst designs. But is not a more natural and less degrading solution at hand? May it have been that, since her husband's return home, she had no opportunity of getting out in the evening before she had attired herself for the night? Constantly in his presence up to that time, the interval between then and the moment when her absence in the tent would be remarked offered her, perhaps, the sole occasion for escape. Bearing this in mind, together with the country and climate, and that Mrs. Winscom had necessarily to cross the compound in this dress to get to the tent where they slept, it requires no great amount of charity to acquit her of a guilty design in this dress about which so much has been said. And if so, the last feature of suspicion is removed. The result is, I do not believe Mrs. Winscom committed adultery with Lieut. Plowden. With a most anxious desire to hold the balance fairly, assigning full weight to the facts proved, and casting the alleged sin of 1853 into the scale of guilt, my mind still vibrates back to the conclusion which the petitioner and Colonel Middleton formed at the time—much levity—great misconduct—no actual adultery. And it is therefore my duty to declare that the respondent is dismissed from the suit.

It is impossible not to feel the deepest interest in the future fate of this unhappy couple. If the petitioner is disappointed at the end arrived at, he will bear in mind that while human judgment is always fallible, he has no cause to quarrel with

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the means. The case has been most fully sifted, and with the most earnest attention of all who had it in hand. And the thought is not without some solace, that human judgment impartially applied has absolved his wife and confirmed his own early conclusions. Thus fortified, he may safely take her back to his home. No one can read the entire submission and pitiful appeal of his wife without indulging the conviction that the future will not be with her as the past. She owes all to his generosity and forbearance, and she will not disgrace that which does him so much honour. May it be so! And should the day come when peace and mutual confidence be established between himself and the mother of his only child, haply he may not regret that it has not been permitted to this Court to undo the most solemn and sacred act of his life. "Forsan et hæc olim meminisse juvabit." As to the co-respondent, I forbear to say anything, except that he must pay his own costs.

February 23.

HALL v. HALL.

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Wife's Costs for Hearing.—Fund paid into Registry.—Death of Husband before Trial.—Claim of Wife's Solicitors upon Fund.

Where the husband had paid a sum into the Registry to meet the wife's costs of the hearing of the petition, and had died shortly before the time appointed for the hearing, the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors, and the payment to them of such taxed costs out of the fund in the Registry, with leave to the solicitors of the husband's executor to attend the taxation.

This was an application for an order to tax the wife's costs under the following circumstances. The petitioner (the hus-

band) filed a petition for judicial separation on the ground of the cruelty of the wife. The wife filed her answer, denying the cruelty, and charging her husband with adultery. The case was set down for trial before the Court and a common jury, and had been in the cause list, and counsel and witnesses were in attendance in Court for several days in the month of July, 1863, but was not heard, in consequence of the accident to the late Judge Ordinary. In January, 1864, the petitioner paid into Court to the credit of the cause a sum of £127, to meet the wife's costs of the hearing, in compliance with an order made at chambers. The respondent's solicitor immediately took steps to prepare for the hearing of the cause, but the petitioner died on the 7th of February, 1864, before the cause came on for hearing. He had made a will, in which he appointed Mr. Harding, his son-in-law, sole executor. The Registry felt a difficulty in acting in the matter without the sanction of the Court, inasmuch as by the terms of the order the sum "was paid into the Registry to "pay the costs of and incidental to the hearing of the cause," and the cause could not be heard in consequence of the death of the petitioner. Notice of the motion had been given to the solicitor of the petitioner and to the solicitors of the executor.

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Dr. Tristram moved the Court to dismiss the petition, by reason of the death of the petitioner, and that the costs, charges, and expenses of the solicitors for the respondent, including the costs of this motion, should be taxed by the proper officer of the Court, and be paid out of the fund in Court. The practice of paying a sum into the Registry for the purpose of meeting the costs of the wife, was substituted for the old practice of paying the wife's proctor his costs before the hearing. It never was intended by the new rule to place the wife's solicitor in a worse position than he would have been under the practice of the ecclesiastical courts.

1864. *Dr. Wambey* appeared for the executor, and submitted that
 February 23. as the costs must come out of the estate, the executor's soli-
 HALL citor was the proper person to be present at the taxation, to
 v. protect the estate.
 HALL.

THE JUDGE ORDINARY: The solicitors for the respondent have a claim on the fund paid into the Registry for their costs. I will make an order for their costs to be taxed and paid out of the fund. There should be some one present at the taxation to protect the estate of the petitioner. The executor is the proper person. The solicitors of the executor will therefore have leave to attend.

February 23
 and March 1.

COOPER v. COOPER.

Wife's Petition.—Return to Husband.—Costs.

COOPER
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 COOPER.

Where the wife has petitioned against the husband and the proceedings are ended, before hearing, by her return to cohabitation, the petition will be dismissed, on the husband's application, only on payment of taxed costs.

In this case the wife's petition for judicial separation on the ground of cruelty was filed on the 20th of January, 1864; on the 26th the respondent appeared, and on the 2nd of February applied for particulars of the alleged cruelty. On the same day the petitioner returned to her husband, and had since been living with him. No order for payment of the wife's costs had been obtained.

Dr. Waddilove, on behalf of the respondent, now moved to dismiss the petition.

Dr. Tristram, for the petitioner, consented to this on payment of her taxed costs.

Dr. Waddilove : No order for payment of costs had been obtained, and the whole matter is at an end by the wife's return to cohabitation, and thereby condoning the cruelty, if there were any. If these costs are to be taken as necessary expenses incurred by the wife, that would depend on the propriety of instituting the suit, whether there was reasonable cause for it (*Brown v. Ackroyd*, 5 El. & B. 819; *Baylis v. Watkins*, 33 L. J. Ch. 300).

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Dr. Tristram : Generally speaking, in this Court the wife's solicitor relies on his right to recover taxed costs against the husband; without this right, no professional man would take up the wife's case. The practice has been, not to dismiss a petition at the instance of the husband unless on payment of costs. If it were otherwise, the wife's solicitor must resort to the vexatious process of taxation *de die in diem*.

Cur. adv. vult.

THE JUDGE ORDINARY : In this case the wife, after she had instituted a suit for judicial separation, returned to cohabitation, and the husband therefore applied to have the petition dismissed. The wife did not oppose that application, but asked for her costs. I have considerable doubt whether, strictly speaking, she has a right to these costs; but if she had, in accordance with the usual practice, applied as the suit went on to have her costs *de die in diem*, she would, undoubtedly, have got them. Therefore, if I were to refuse the application, she would be deprived of her costs simply because she had omitted to comply with that practice, and the result would be, that the extreme system of taxation *de die in diem* must be adopted in all cases, or otherwise the wife's attorney would be in peril as to her costs. Unnecessary taxation is always to be deprecated. The petition will be dismissed upon payment of costs.

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March 22.

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v.
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AND THOMAS
(EAMES AND
BURROUGHS
intervening).

CLEMENTS v. CLEMENTS AND THOMAS (EAMES AND
BURROUGHS intervening).

*Dissolution of Marriage.—Intervention.—23 & 24 Vict.
c. 144, s. 7.*

At any time before a decree *nisi* for dissolution of marriage is made absolute, it is competent for one of the public to intervene, although three months may have elapsed since the decree was pronounced.

The Court will not act upon affidavits filed in opposition to a decree *nisi*, unless it is satisfied that an intervener is properly before the Court.

An appearance was entered for A., and affidavits were filed in opposition to a decree *nisi*. Affidavits were then filed by the petitioner, showing that A. had never authorized the intervention. An appearance was then entered for B., and further affidavits were filed.

The Court refused to take notice of the intervention of B., and being satisfied that A. had never authorized the intervention in his name, made the decree absolute.

SEMPLE, that the Court will not act upon an intervention, when satisfied that it is made at the instance of the respondent or co-respondent.

This was a petition by a husband for dissolution of marriage. The respondent and co-respondent did not appear.

On the 27th of November, 1863, the Judge Ordinary pronounced a decree *nisi* for the dissolution of marriage. On the 3rd of March, 1864, search was made in the registry, and an affidavit of no appearance was filed. On the 5th of March an appearance was entered for William Eames, of Newport, innkeeper, under the 7th section of 23 & 24 Vict. c. 144, and affidavits of the respondent, co-respondent, and of other persons were filed, showing cause against the decree being made absolute. The effect of these affidavits was, that the respondent and the co-respondent had not been guilty of the adultery charged; that the petitioner had induced the respondent to invite the co-respondent to her house in order to ob-

tain evidence against them; and that the petitioner had been guilty of several acts of adultery and of other misconduct, and had condoned the respondent's adultery.

Dr. Spinks, for the petitioner, moved that the decree might be made absolute, notwithstanding the appearance entered and the affidavits filed in the name of Eames. An intervention by one of the public under the first branch of the 7th section of 23 & 24 Vict. c. 144, is limited to the three months from the date of the decree *nisi*, and three months having expired on the 23rd of February, the affidavits ought not to have been received. The affidavits of the respondent and co-respondent cannot be read, as they are not competent witnesses in the original suit; and the Court will not allow them to do by a side wind now what the law prohibits in the first instance. There is no intervener before the Court, for William Eames has sworn, on affidavit, dated the 17th of March, stating that he had never given instructions for an appearance to be entered on his behalf.

Mr. Searle, for the intervener: It has been held in *Bowen v. Bowen and Evans*, that the Queen's Proctor may intervene at any time before the decree *nisi* is made absolute, and one of the public stands in the same position. If the Court is satisfied of the truth of the facts stated in the affidavits, it will not make a decree absolute without further inquiry. A respondent and a co-respondent have a right to give evidence in support of an intervention (*Cox v. Cox*, 2 Swab. & Tris. 306). As to the question whether instructions were given by the intervener, time should be given to answer his affidavit.

THE JUDGE ORDINARY: I am disposed to think that the affidavits of the respondent and the co-respondent are admissible on the question of collusion, but it is not necessary to decide that point. The case must stand over for a week, in

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intervening).
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1864. order that I may know whether any intervener is before the
 March 23. Court.

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 intervening).

An affidavit was then filed by Mr. Batchelor, a solicitor at Newport, whose London agent had, by his instructions, entered the appearance for Eames. Mr. Batchelor stated that, although he had received no written retainer, Eames had authorized him to act for him in protecting the respondent, and had paid £1, and had given an I O U for two guineas on account of the costs. Since the last motion an appearance had also been entered for Richard Burroughs, an innkeeper of Newport, on a written retainer.

March 15. *Dr. Spinks* moved that the decree should be made absolute; and contended that, Eames having disclaimed his authority to Batchelor to intervene, the Court could take no notice of the affidavits.

Mr. Searle: It appears from the affidavits that Eames did instruct Batchelor, and he cannot, after having filed affidavits, withdraw from the intervention without leave of the Court. Even if Eames is not before the Court, there is now another intervener (Burroughs) in his place.

THE JUDGE ORDINARY: The Court will never sanction such a substitution of one intervener for another. The case must stand over, and the petitioner and his attorney are at liberty to answer the matters contained in the affidavits.

Affidavits were accordingly filed by the petitioner, denying the adultery and misconduct with which he was charged, and the other allegations in the affidavit; and by Mr. Pain, the petitioner's solicitor, corroborating Eames, and stating the circumstances under which Eames disclaimed the intervention.

March 22. *Dr. Spinks* renewed the motion for a decree absolute.

Mr. Searle, contra : If the Court is satisfied that the petitioner has been guilty of the misconduct charged in the affidavits it will not make the decree absolute, no matter from what source the information is derived, or by what motives the persons giving it were actuated. If the Court has any doubt upon the affidavits, it will require further information.

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intervening).

THE JUDGE ORDINARY: I think that this application comes before the Court in such a way that it cannot be entertained. The respondent and co-respondent have not set up the defence now put forward in the usual course. I am satisfied that if Eames did intervene, he was virtually intervening for the respondent and co-respondent. *Stoate v. Stoate*, 2 Sw. & Tr. 384, is an authority that they have no right to show cause against the decree being made absolute. Can they put forward a third person for that purpose? It is not necessary to decide that question, because I am satisfied, upon the affidavits, that Eames never intervened, and never intended to intervene. The decree, therefore, will be made absolute. I shall make no order as to costs, for, although I cannot act on the affidavits, I cannot help seeing that the petitioner's conduct gives some ground for the intervention.

FITZGERALD v. FITZGERALD.

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December 17.

Admissibility of Depositions of a Deceased Witness.—Reasonable Time for Cross-Examination.—Practice.

FITZGERALD

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The deposition of a deceased witness is admissible on condition, not only of its having been taken under the sanction of an oath, but also of sufficient notice having been given to the party against whom it is tendered, to have enabled him to attend and cross-examine the witness. Where notice was given, about two P.M. on a Saturday,

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to the respondent's solicitor in London, that a witness was to be examined at Bath on Monday, under an order of the Court obtained by the petitioner:

HELD, that the notice was insufficient to enable the respondent's solicitor to attend and cross-examine, and that the evidence so taken without cross-examination was inadmissible.

This was the wife's petition for dissolution of marriage by reason of the husband's cruelty and adultery. The question was the admissibility of the depositions of a man of the name of Kelly, since dead, taken on oath under an order of the Court, dated the 22nd of November, 1862, made by virtue of the 47th section of the Divorce Act, on motion of counsel for the petitioner, a notice of such motion having been given to the respondent's solicitor on the previous evening. The respondent's solicitor had not instructed counsel on this motion. The order stated no day or time for the examination. About two o'clock on the 22nd of November (Saturday), the respondent's solicitor was served with a copy of the order, and a notice that it was intended on behalf of the petitioner to examine Kelly on Monday at Bath. No one attended at Bath on behalf of the respondent, and the examination in chief of Kelly was proceeded with under the order.

Mr. Freshfield, the respondent's solicitor, was sworn, and deposed to some of the above facts; and further stated, that he had entered an appearance on the 11th of November, 1862, for the respondent; that on the 15th of November, he received notice of an examination of Kelly, described as of the 'Bath and Cheltenham Gazette' office, but then in the Bath hospital, under an order of the Court, dated the 7th of November; that he wrote to petitioner's solicitor, objecting to such evidence being used; that on the 21st and 22nd of November, he was without any instruction from his client for materials as to cross-examination, and did not know who Kelly, so described as above, might be, or what he was to speak to. Mr. Fitzgerald was in Ireland.

Mr. M. Chambers, Q.C. (*Dr. Wambey* with him), in support of the admissibility of the evidence, cited *Fynney v. Beazley*, 20 L. J. Q. B. 395. 1863. December 17.

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The Queen's Advocate (Sir R. J. Phillimore) (*Mr. Huddleston*, Q.C., and *Dr. Spinks* with him), *contra*, objected that the order was made before issue joined, and that the respondent's solicitor had no time to prepare for the cross-examination of Kelly.

THE JUDGE ORDINARY: The foundation of the admissibility of any evidence before a jury is, that it should be on oath, and that the party against whom it is tendered should have had a reasonable opportunity of cross-examination. This rule has prevented the depositions, even on oath, of dying persons from being used as evidence. The order in this case was made by power given to the Court by statute. It is said that such orders are never made before issue joined; that is no doubt the general rule, as stated in *Shaw v. Shaw*, 2 Sw. & Tr. 642, but subject to reasonable exceptions, as where the questions in the cause are well understood, and a witness is dangerously ill. In this case I think the order is good; but the party against whom it was made should have had reasonable notice for cross-examining. I think nothing of Mr. Fitzgerald being in Ireland—when a man has appeared in a suit, it must be taken that he furnishes his solicitor with the necessary information to conduct the cause; nor of the misdescription of Kelly, if it were a misdescription: the only question is, whether a reasonable time was given to admit of cross-examination.

On Friday the 21st, notice was given to Mr. Freshfield that on the 22nd an order for the examination of Kelly would be applied for; that application was not opposed, and the order was made. At two o'clock on Saturday, notice was given that the witness would be examined on Monday at Bath. There

1863. is no particular time prescribed by the rules of the Court
 December 17. as to a notice in such cases. But with regard to summonses
 FITZGERALD which present the only analogy I can find, the 3rd Rule directs
 v. that the service must be one clear day at least before the
 FITZGERALD. summons is returnable, and before seven P.M.; on Saturday,
 before two P.M. In the present case, I think the notice did
 not allow a reasonable time for preparing a cross-examination,
 and I rule against the admissibility of this evidence.

1864. (*Before the Full Court—THE JUDGE ORDINARY, CHANNELL, B., and*
 April 27 & 28. *KEATING, J., on appeal from the decision of the JUDGE ORDINARY,*
refusing rule nisi for a new trial.)

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FITZGERALD v. FITZGERALD.

Motion for New Trial.—Adultery and Cruelty.—Order to examine Witness.—Time for Cross-Examination.—Decision of Judge at Trial on Matter not within the Province of the Jury.

Where it is necessary for the petitioner to establish two points in order to obtain the prayer of the petition, the Court would not, even if dissatisfied with the verdict of the jury on one point, send that down for a new trial, because, if a different verdict were found on that point, it would not be sufficient to ground the relief prayed.¹

The Judge Ordinary had held that notice given to the opposite solicitor at a quarter before two P.M. on Saturday, in London, of an examination of a witness to be held at Bath at two P.M. on the following Monday, was not a reasonable and sufficient notice to enable such solicitor to attend and cross-examine, and had therefore refused to admit evidence so taken.

In the circumstances, the Court refused to interfere with the ruling of the Judge Ordinary

Per CHANNELL, B.: When a question to determine the admissibility of evidence has been decided by a judge presiding at a trial by jury,

¹ See also the case of *Cartlidge v. Cartlidge*, decided by Sir C. Cresswell, and reported *post*, note, p. 406.

the decision of the judge on such question may be reviewed by a court of appeal. 1864.

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THE JUDGE ORDINARY: Quære, whether such decision of a judge presiding at a trial is properly subject to the revision of a court of appeal.

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This was originally the wife's petition for dissolution of the marriage, by reason of the cruelty and adultery of the husband. The husband's answer traversed these charges, and the issues raised were, by a verdict of the jury, found in favour of the respondent at the sittings after Michaelmas Term, 1863.

On the 9th of February, 1864, *Mr. M. Chambers*, Q.C. (*Dr. Wambey* with him), moved the Judge Ordinary for a rule *nisi* for a new trial, which was refused, and from which refusal the present appeal was brought.

Sir F. Kelly, Q.C. (*Dr. Wambey* with him), in support of the appeal: We claim a rule *nisi* for a new trial on four grounds:—1. Improper rejection of evidence. 2. Verdict against weight of evidence. 3. Surprise. 4. New evidence discovered since the trial. (The decision of the Court is here reported on the two first points only.) The evidence rejected was the deposition of a man named Kelly (who died before the issues were tried), under the following circumstances:—The petition was filed on the 30th of October, 1862. On the 2nd of November, *Mr. Capes*, the petitioner's proctor, was informed that Kelly was ill at Bath. On the 4th, he heard by telegram that Kelly was dangerously ill in the hospital at Bath. On the 7th, and before the respondent had appeared, the Court was moved for an order to examine Kelly, which was made, and an examination took place under the order. On the 11th of November, *Messrs. Freshfield* entered an appearance on behalf of the respondent. On the 12th, *Mr. Capes* gave notice by letter to *Messrs. Freshfield* of the order obtained, and of the examination. On the 14th of November, the depositions so taken were filed in the registry. On the 15th,

1864. Mr. Capes wrote again to Messrs. Freshfield, stating what April 27 & 28. had taken place, and that Kelly was dangerously ill. On the 17th, Messrs. Freshfield wrote to Mr. Capes, to the effect that they refused to interfere in the examination of Kelly, and should object to evidence so obtained being used at the trial. On Friday, the 21st of November, about two P.M., Messrs. Freshfield received a notice that the Court would be moved, at its sitting on Saturday, to examine Kelly again on the following Monday, or as soon thereafter as might be. Messrs. Freshfield took no notice of the intimation, and did not instruct counsel to appear on the motion. A second order was accordingly made on the Saturday morning, and drawn up in general terms for the examination of Kelly, without any limitation of day or time. At 1.45 on the Saturday notice was served on Messrs. Freshfield that the examination of Kelly under the second order would take place at Bath, at two P.M. on Monday. Messrs. Freshfield took no step in consequence of this notice, and were not represented at the examination of Kelly. At the trial, the Judge Ordinary held that the order made on Saturday the 22nd was a good order; but that the notice to Messrs. Freshfield on the Saturday did not give them a reasonable time to prepare for and attend the examination on Monday. We submit that Messrs. Freshfield were bound to have done something in consequence of the notice of Friday, knowing how ill Kelly was; and as they let the matter pass without any interference, it was their own fault that no cross-examination took place, and the evidence ought to have been admitted.

A question was here raised by the Court, whether the decision of the judge who tried the cause, determining a collateral question (such as whether due notice had been given to enable the opposite party to cross-examine), was, or was not liable to be reviewed by the Court of Appeal, and the Court adjourned for the day.

On the following morning, *Sir F. Kelly*, on the point last mentioned, cited *Whyte v. Hallett*, 28 L. J. 208, Ex. ; *Cleave v. Jones*, 7 Ex. R. 421. 1864. April 27 & 28.

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CHANNELL, B. : In the last case in the Queen's Bench, the Court determined that they must clearly see that the judge at the trial was wrong before they interfered with his ruling ; this implies that they had the power to review it.

Sir F. Kelly then went at length into the evidence on the issue of adultery, and contended that the verdict on that issue was unsatisfactory. He did not feel that he could contend successfully for a new trial on the issue of cruelty, and did not lay much stress on the third and fourth grounds of his motion.

CHANNELL, B. : This is an appeal from the decision of the Judge Ordinary, who refused a rule for a new trial. I am of opinion that there should be no rule *nisi*.

It was a case in which Mrs. Fitzgerald petitioned for a dissolution of her marriage. To obtain such a decree, it was necessary for her to prove both adultery and cruelty. I understand the practice of the Court to have been, that if on such a petition adultery were proved, but not cruelty, the petition might be amended at the hearing, and a decree for judicial separation made. Nothing of this sort was done in the present case, and the petitioner went to issue on her petition for a decree of dissolution, taking her chance of obtaining such a verdict on both issues as would entitle her to the decree prayed. The rule has been moved on four grounds ; the most important is, whether the verdict of the jury on the issue as to adultery is so far against the weight of evidence as to call upon the Court to grant a new trial. It seems that the jury expressed a strong opinion on the point of adultery at the close of the respondent's case, and at once called upon

1864. the petitioner's counsel to reply. The jury were not, in the
April 27 & 28. opinion of the judge who presided at the trial, precipitate in
the view which they took; and the judge is not dissatisfied
FITZGERALD with the verdict as to adultery. When the verdict of the jury
v. finds the fact of adultery, and such a verdict is sought to be
FITZGERALD. set aside as unsatisfactory, the Court would probably be more
ready to interfere by granting a new trial than when the
verdict acquitted the party charged. I am not satisfied by
the able arguments of the counsel for the petitioner, that my
duty compels me to form an opinion against the verdict and
the opinion of the judge before whom the issues were tried.
During the course of a four days' trial, many things may have
occurred which would give a colour to the facts which is want-
ing when the evidence is detailed before the Court for the
purpose of asking a new trial. But if I thought otherwise
on the question of adultery, yet, as the verdict in favour of
the respondent on the question of cruelty is wholly undis-
puted, I think no rule should be granted. It is sought to
disturb the finding of the jury on one particular point only;
but had the verdict on that one point been the other way, the
verdict on the other question standing, the petitioner would
not be entitled to the decree asked for.

The second question is, whether certain evidence was im-
properly rejected. Though the admissibility of evidence is a
question for the judge, not the jury, at the trial, yet if this
Court clearly saw that the evidence had been improperly re-
jected, and that the rejection had led to a miscarriage of
justice, I am of opinion that it would have the power to
review the decision of the judge who presided at the trial;
but we must see our way very clearly. The order to examine
is not so precise as is usual in the Common Law Courts. No
time was fixed by it, nor did it contain the usual terms
and conditions. The main point is, whether proper and
reasonable notice of the intended examination was given.
That must depend on all the circumstances of the case. If I

felt called upon to decide whether notice on Saturday at two, 1864.
 Sunday being a *dies non*, to attend an examination on Monday April 27 & 28-
 at two, were sufficient, I should be inclined to think that a
 twenty-four hours' notice is not a reasonable notice, and that
 the judge did right in rejecting the evidence; but I need not
 express a positive opinion on this point, for the evidence in
 question only goes to one of the two issues in the cause. It
 does not affect the question of cruelty, the finding on which,
 in favour of the respondent, disentitles the petitioner to the
 relief prayed. (The learned Judge also disposed of the other
 points on which the rule was moved.)

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KEATING, J.: I am also of opinion that there should be no
 rule *nisi*.

The petition was for dissolution of marriage; in order to
 obtain that, the petitioner is obliged to satisfy the Court both
 as to adultery and cruelty. Those two questions were tried
 by a special jury, and their verdict was against the petitioner
 on both points; we are asked to grant a rule for a new trial,
 so far as regards the verdict on adultery, as being against the
 evidence in the case. The evidence on which Sir F. Kelly
 laid chief stress consisted of letters written by the respondent,
 and of admissions by word of mouth said to have been made
 by him. As to such evidence, it must be remembered that
 the respondent cannot be asked whether or no he made the
 admissions, nor to explain the letters, and the jury have a
 right to bear this in mind. The Judge Ordinary, who had
 the advantage of hearing and seeing the witnesses, was not
 dissatisfied with the verdict on that point. As to the rejection
 of evidence, it comes at last to the question, whether under
 the circumstances sufficient notice was given. If the case had
 turned on what answer the Court should have given to that
 question, my present impression is, that the time mentioned
 was not unreasonable; it is a question of fact, and judges as
 well as other men may differ. But it is not necessary that I

1864. should express a judicial opinion, because I agree with my
 April 27 & 28. brother Channell, that we ought not to grant a new trial on
 FITZGERALD one point which does not go to the whole case.

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THE JUDGE ORDINARY: I have very little to add. All the questions raised to-day applying to the verdict on adultery (that on cruelty remaining unimpeached), it would be useless to send that point by itself to another jury. The mode in such cases has been to apply at the trial to alter the prayer of the petition; but if otherwise, so far as I am concerned, I should still be of the opinion I held at the trial, that there was quite as cogent evidence on one side of the case as the other. As to the rejection of evidence, I only wish to observe in addition, that on Monday the 17th, the respondent's solicitor gave notice to the petitioner's solicitor that he would not be bound by the examination then taken; no step was taken by the petitioner's solicitor till the Friday. No explanation has been given of this delay, and the man, though on what proved his death-bed, did not die till the Thursday week following. It is not necessary to decide the point; if it were, I should have wished the question to be argued, whether the decision of a judge at a trial sitting as judge of a matter of fact, ought to be subject to the revision of a court of appeal.

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CARTLIDGE v. CARTLIDGE.

May 5.

Verdict finding Cruelty and Adultery.—Rule for New Trial refused.

CARTLIDGE
 v.
 CARTLIDGE.

Query, if several distinct issues are found in favour of the petitioner, and the Court, on motion for new trial, is of opinion that the verdict ought not to be disturbed on some issues, but was incorrect on others, should it grant a new trial as to the latter only?

And if so, might not the petitioner elect to abandon so much of her petition, and ask for such relief as she would be entitled to at the hands of the Court on the issues found in her favour.

This was originally the wife's petition for dissolution of marriage, on

the ground of adultery and cruelty. The issues raised were found in her favour by the verdict of a jury, and *The Queen's Advocate* (Sir R. J. Phillimore) had moved for a rule *nisi* for a new trial; and

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THE JUDGE ORDINARY (Sir C. Cresswell) now gave the following judgment:—This was a petition by Ann Cartlidge against Joseph Cartlidge, for a dissolution of marriage by reason of cruelty and adultery. The jury found that both charges were proved. The Queen's Advocate moved for a rule for a new trial, on the ground that the verdict was not supported by the evidence. As to the adultery, it was deposed to by three females, who swore to his having had connection with them. One was corroborated to a certain extent by a witness, who deposed to having seen them walking together near the place where the adultery was said to have been committed. Another was corroborated by the evidence of a young man, formerly in the respondent's employ as shopman, who swore that he was an eye-witness to the act committed in the respondent's wareroom; and the same witness stated that he had seen a similar act committed by the respondent with some other female whose name is unknown. It is very true that the female witnesses were all prostitutes, but their evidence is not therefore to be rejected. The jury were cautioned against believing it without careful consideration; but I cannot at all find fault with the verdict which they found on that issue. This state of things raises at once a very important question with reference to trials of this description, viz. whether, there being two issues, the verdict on one satisfactory, the other not, the Court ought to grant a new trial as to both? By analogy to the usage of common law courts, if a petition is founded on several grounds, and some are fully established, and as to others, a new trial applied for by the respondent, the petitioner might abandon them, and ask for a decree on so much of the petition as was fully proved; and here, if the wife elected to abandon her claim to a dissolution of marriage, and ask for a judicial separation on the ground of adultery, as at present advised, I think I ought to grant it; and there is much reason for saying, if there are two questions raised for the determination of a jury, which are independent of each other, the Court ought not to order a new trial as to both, if it is satisfied as to one. But it is not necessary to decide that point; for although I should probably have hesitated myself to find that the charge of cruelty was established, yet there was, undoubtedly, affirmative evidence fit for the consideration of the jury, and there was that in the manner and demeanour of the witnesses who gave evidence to negative

1863. it, which might well injure their credit with the jury. I cannot, therefore, go so far as to say that I am dissatisfied with the verdict, and I think that I ought not to disturb it.

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1864. (*Before THE JUDGE ORDINARY and a Special Jury, and on motion for a new trial.*)
February 18,
March 22,
and May 3.

NARRACOTT v. NARRACOTT AND HESKETH.

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Petition for Dissolution and Damages.—Conduct of Cause.—Evidence.—Verdict for Petitioner on Issue of Adultery.—Jury discharged on Issue of Cruelty raised by Co-Respondent.—Application of Damages.

The husband petitioned for dissolution of marriage, and prayed damages.

The co-respondent traversed the adultery, and charged the husband generally with cruelty to his wife, which latter fact might call for the exercise of the discretion of the Court under the 31st section of the Divorce Act. During the petitioner's case, some witnesses were asked as to the general terms on which he lived with his wife.

On the part of the co-respondent, witnesses deposed to certain acts of violence committed on the wife by the husband, and the Court admitted evidence in reply limited to those particular acts and occasions. The jury found a verdict for the petitioner on the issue of adultery, and assessed the damages at £2500. On stating that they could not agree on the issue of cruelty, they were discharged by the Judge Ordinary.

On motion for a new trial, the Court held that it had rightly discharged the jury from giving a verdict on the issue of cruelty, as it was ultimately a question for the opinion of the Court under the 31st section of the Divorce Act. If the facts ascertained by the verdict are sufficient for the Court to found a decree on, the function of the jury is discharged.

The Court, being of opinion that cruelty was not proved against the husband, but being dissatisfied with his conduct towards his wife, directed the damages, after payment of the surplus costs of the petitioner, if any, to be settled on the respondent *dum casta vixerit*, and for life; after her death, or on breach of the above condition, the fund to go to the two children of the marriage:

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SEMPLE, in some cases the Court would grant a new trial on the ground of excessive damages.

This was the husband's petition for dissolution of marriage, and for damages. The respondent did not appear. The co-respondent's answer traversed the adultery, and charged the petitioner, in very general terms, with cruelty. The issues and assessment of damages came on for trial before the Judge Ordinary, by a special jury, on 17th of February.

Two witnesses were called for the petitioner, who deposed that he lived on good terms with his wife till he had reason to suspect that she had committed adultery. For the co-respondent several witnesses were examined, who spoke to specific acts of cruelty inflicted by the petitioner.

At the close of the co-respondent's case, the *Solicitor-General* (Sir R. P. Collier) (*Mr. Karlake, Q.C.*, and *Mr. Beresford* with him), on behalf of the petitioner, proposed to call witnesses in reply, to contradict the evidence of the co-respondent's witnesses upon the charge of cruelty.

The Queen's Advocate (Sir R. J. Phillimore) (*Dr. Spinks* with him) objected to the admission of such evidence at that stage of the trial. If the petitioner's case had been confined to the proof of adultery, we admit he might now be in a position to give evidence in reply; but as the *Solicitor-General* touched on the question of cruelty, he was bound to give, in the first instance, all the evidence he had on that point.

Cur. adv. vult.

THE JUDGE ORDINARY: The question raised yesterday is
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one which presents very great difficulty, and for this reason, that the proceedings in this Court are not strictly analogous to those in common law courts, and no decision in this Court has laid down a definite rule on the subject. In common law courts certain issues are raised by the pleadings, and the burden of proof is cast on one or other of the parties, according to the form of those pleadings; but even in those courts questions of great difficulty arise, and the rule has varied as to the extent to which parties should be allowed to give evidence in reply. The proceedings in this Court are of a totally different character, and great difficulty arises from the circumstance that the Act of Parliament, under which these proceedings are taken, confides to the Court and to the jury separate functions. Questions of fact have to be decided by the jury, and at the same time conclusions of fact have to be arrived at by the Court, upon which it is to exercise its discretion. It has not been thought necessary to have two separate inquiries, one for the judge and the other for the jury, and it is obvious that such a system would lead to expense, trouble, and delay. But when the two inquiries are mixed up together, questions of this sort arise. I feel great difficulty in laying down any general rule founded on the authority of preceding practice, and I must look for guidance to the abstract and general justice of the case. I think it was certainly part of the petitioner's case before the Court and the jury, to prove not merely that his wife had committed adultery, but also that he had conducted himself towards his wife in such a manner as to entitle him to relief. He was bound to give evidence of his conduct towards his wife, not only on that ground, but also on the ground that he claims substantial damages, and he must therefore follow the practice in the old action for criminal conversation, in which it was always usual to show that the husband had treated the wife in such a way that the jury ought to deal liberally with him as to damages. I think, therefore, it was part of the husband's case to go thus far.

But I cannot shut my eyes to the fact that, after the plaintiff, in an action for crim. con., had gone thus far, the defendant would have been entitled to do what the co-respondent has done in the present case, viz. give evidence of definite acts of cruelty, of which, as there was no plea of cruelty, the plaintiff would have had no notice. Here the co-respondent is somewhat in fault, because, instead of pleading cruelty, with some specifications of time and circumstance, he has confined himself to a charge of cruelty of the most general character. The petitioner is also in fault, by having omitted to obtain particulars. Both parties are, therefore, somewhat in fault; but still the fact remains, that evidence has been given of acts of cruelty, of which, practically, the petitioner had no notice. It is much more difficult and questionable to reject the evidence than to admit it. Upon the whole, I determine to admit so much of the evidence offered as is in direct contradiction of the cruelty proved by the co-respondent. Upon the analogy of common law practice, and on the reason of the case, I think that is the proper course. I find that the petitioner examined two witnesses for the purpose of showing the terms upon which he was living with his wife; thus there was some evidence, though slight, of general conduct, and I ought not to allow him to extend and amplify that evidence, though it is difficult to draw the line. I shall admit evidence to contradict the specific acts of cruelty spoken to, but not as to general conduct.

The jury retired to consider their verdict, and after some time, stated that they were divided as to the cruelty, but were agreed as to the adultery and amount of damages.

THE JUDGE ORDINARY: That being so, I shall not press you for a verdict on cruelty, as it is a question for the Court to ascertain under the 31st section, though I should have been glad of the assistance of your verdict, if you had agreed on one.

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The verdict was then taken for the petitioner on the issue of adultery, damages £2500.

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AND HESKETH.
March 22.

The Queen's Advocate and *Dr. Spinks* moved for a new trial, it having been arranged that the Solicitor-General should show cause at the same time. First, the co-respondent having raised the question of cruelty, had a right to the verdict of a jury on that issue, as they found for the adultery. By sect. 28 of the Divorce Act, "Upon any such petition (*i. e.* for dissolution) presented by a husband, the petitioner shall make "the alleged adulterer a co-respondent, etc. . . . And the "parties, or either of them, may insist on having the contested "matters of fact tried by a jury, as hereinafter mentioned." Cruelty has been treated as a question of fact for the jury since the establishment of the Court. The Court has only power to discharge the jury altogether, not as to one issue when they find on the other. Suppose the co-respondent had raised no issue on the question of adultery, and the jury had before them only the issue of cruelty and the amount of damages. [By the COURT: Is it clear that if the Court dismissed the petition, the petitioner could not have damages?] It is apprehended that if the petition is dismissed, the whole proceeding fails. Under the 33rd section, the husband may petition for damages alone, without any prayer for dissolution. Secondly, the damages were excessive.

The Solicitor-General (*Mr. Beresford* with him), *contra*.—First, on the 31st section of the Divorce Act, they contended that the cruelty was a matter for the Court to satisfy itself of, and cited *Pearman v. Pearman and Burgess*, 1 Sw. & Tr. 601; *Seddon v. Seddon and Doyle*, 2 Sw. & Tr. 640. The Court has power to discharge a jury from finding an immaterial issue (*Rex v. Johnson*, 5 A. & E. 488). Secondly, in actions for crim. con. the rule was, not to set aside verdicts because the damages might appear excessive (*Wilford v. Berkeley*, 1 Burr.

609; *Duberley v. Gunning*, 4 T. R. 651). [By the COURT: The case of *Chambers v. Caulfield*, 6 East, 244, qualifies the former cases, at least where it appears that the jury acted under the influence of undue motives, or of gross error and misconception of the subject.]

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Dr. Spinks, in reply, cited *Goode v. Goode and Hamsom*,
2 Sw. & Tr. 253.

Cur. adv. vult.

THE JUDGE ORDINARY: The jury in this case found the adultery of the respondent and co-respondent to have been proved, and assessed the damages at £2500. The Court is now asked for a rule *nisi* for a new trial, on the ground that the jury, being equally divided on the question of cruelty, which was also submitted to them, were discharged from giving any verdict on that issue; and it was contended that the co-respondent (the respondent did not appear) was entitled to a verdict on all the issues, or to have the jury discharged on all.

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The basis of this argument is a supposed identity, in legal effect, between the written statement of questions of facts to be tried, which is prepared by the direction of this Court, under sect. 38 of the Divorce Act, with the *Nisi Prius* record in a common law action. Authority is not wanting, even at common law, for the discharge of a jury on one issue while the verdict is maintained on others (*King v. Johnson*, 5 Ad. & Ell. 488). But I do not stop to investigate the question at common law, because I am of opinion that the above-mentioned identity does not exist. The common law record—a transcript of the roll in the action—contains the several statements and counter-statements of the parties, put together according to certain technical rules of pleading, and in such fashion that the issues of fact very often do not admit of being determined in part and undetermined as to the rest. Further, there are no means, according to the technical rules which pre-

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vail at common law, of founding a legal judgment on the record, until all the material issues as to which the parties have put themselves on the country have received their solution from a jury.

But this Court is fettered by no such technical rules. Any "contested question of fact," which the parties desire, or any question of fact "arising on the proceedings" which the Court may desire to be so dealt with, are, under the Act, to be submitted to a jury. And for this purpose all that is requisite is, that such questions should be reduced into writing in such form as the Court shall direct. If the jury determine so many of these questions and in such a manner that the Court can find sound foundation for a decree, the office of the written questions is answered, and the function of the jury sufficiently discharged.

In the present case, the question upon which the jury were unable to agree concerns a matter upon which, under sect. 31, the Court is directed to form an "opinion," and on that opinion to exercise a discretion in refusing or granting a decree. In no other aspect has the question any materiality in the case. It was, however, submitted to the jury, and their verdict, if they had found one, would have been an assistance to the Court in forming its opinion. The inability of the jury to agree upon it deprives the Court of that assistance, but is no reason for sending the whole case to a new trial. The motion for a new trial must therefore be refused.

As the adultery of the respondent was fully proved, I must pronounce a decree *nisi* for a dissolution of the marriage, with costs against the co-respondent. The cruelty alleged against the petitioner has not been made out to my satisfaction. The evidence of it did not fail from falling short, but rather from going too far. This destroyed it in part and weakened it in the rest, so as not to command the credit of either Court or jury. At the same time, the undoubted conduct of the petitioner towards his wife, as disclosed at the

trial, could hardly have commended itself to any who heard it; and the damages, after payment of the surplus costs of the petitioner, if any, must be settled on the respondent "*dum casta vixerit*," and for life. After her death, or breach of the above condition, the fund must devolve on the two children of her marriage.

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C A S E S

IN THE

COURT OF PROBATE.

In the Goods of WILLIAM CAWTHRON (deceased).

1863.

November 17.

*Will.—Conditional in Terms.—Execution after happening
of Event.*

In the Goods of
WILLIAM
CAWTHRON.

A testator wrote and signed a Will on the 14th of August, 1858, beginning, "In the prospect of a long journey, should God not permit me to return to my home, I make this my last Will." He afterwards went on a journey, and returned on the 25th of September, 1858. In February, 1859, he acknowledged his signature to the Will in the presence of two witnesses, who duly subscribed the same.

Held, that the Will was entitled to probate, as it was executed after the completion of the journey contemplated.

William Cawthron, late of Bideford, Devonshire, died on the 19th of March, 1863. On the 14th of August, 1858, he wrote a testamentary paper, which commenced:—"In the prospect of a long journey, should God not permit me to return to my home, I William Cawthron, senior, make this my last will and testament;"—and concluded,

"Witness my hand, this 14th day of August, 1858,

"WILLIAM CAWTHRON,

"Bridgeland Street, Devon."

1863. At the end of August, 1858, the deceased, accompanied by
November 17. his wife, left home on a journey to Shrewsbury, and returned
from thence to Bideford on or about the 25th of September
in the same year. On the 17th of February, 1859, the de-
ceased, being very ill in bed, requested Mr. Smale to make
certain alterations in the paper above referred to, and par-
ticularly to strike out and correct the date thereto. After he
had done so, Mr. Cawthron acknowledged his signature, as
previously written at the foot of the will, by tracing it over
with a dry pen in the presence of Dr. Ackland and Mr. Smale,
who thereupon signed their names as witnesses. Mrs. Caw-
thron stated in her affidavit, that in February, 1859, the de-
ceased was not contemplating any journey whatever, and that
she is convinced, that when he executed the will, he intended
it should operate absolutely.

In the Goods of
WILLIAM
CAWTHRON.

Dr. Middleton moved for probate to be granted to William Cawthron and Louisa List, the executors therein named. As the will was not executed until after the event had happened upon which the condition depended, the deceased must have intended it to operate absolutely. He cited, *In the goods of Hobson*, 7 Jur. N. s. 1208; *Roberts v. Roberts*, 2 Swab. & Trist. 337. In *Parsons v. Lance*, 1 Ves. sen. 189, referred to in *Roberts v. Roberts*, Lord Hardwicke, in speaking of a conditional devise says, "The penning of a will then being conditional, collateral or parol proof cannot be taken into consideration, which would be dangerous, and what the Court, since the Statute of Frauds, is not warranted to do; for nothing will set it up, but some act done by him (the testator) after that event to republish the will, or defeat the conditions." Here there was an act done.

SIR J. P. WILDE: I think that this will operated absolutely, and must therefore be admitted to probate. This case is much stronger than the two cases cited. At the time the

deceased set off on his journey, the will was not executed, and 1863.
 if he had died at that time, he would have died intestate. November 17.
 The will had no force at all until after the deceased had re- In the Goods of
 turned home, and its validity cannot be limited by that event. WILLIAM
 CATTELL.

In the Goods of CATTELL (deceased).

December 15.

*Signature at Foot or End.—Testamentary Dispositions,
 written at different times.*

In the Goods of
 CATTELL.

Where a deceased has signed his name in the presence of witnesses at the end of several clauses of a dispositive character, apparently written at different times, the presumption is that the deceased intended to give effect to the whole of what was written at the time he so made his signature.

The deceased in this case died in July, 1863, leaving a duly executed will, dated the 22nd of May, 1848, written on the first and on the upper part of the second page of a sheet of paper. Immediately beneath the names of the attesting witnesses the following writing appeared:—

“ I hereby appoint my second son, John Leigh, to be executor of this my will.

“ In consequence of the alterations in my family since writing the above, in deaths, etc., I have thought proper to make the following additions and alterations.”

On the third page the writing was continued.

“ Will continued.—First, I bequeath to Miss Cox, my late wife’s sister, the sum of £20 as a legacy, duty free; secondly, I bequeath to all my grandchildren that are living at the time of my death, one sovereign each, and the remainder to be equally divided amongst my sons that should

1863. "be living at my death, after paying my doctor's bill, and
December 15. "funeral expenses, etc.

In the Goods of "N.B. The bonuses that should be added to my life in-
CATTRALL. "surance must be included in the above alterations.

"Village of Hale, 19th day of June, 1863.

"THOMAS W. CATTRALL.

"With regard to furniture and personal property, I leave to
"my youngest daughter a pair of the best mahogany card-
"tables and the family Bible; to my eldest son I leave my
"barometer, and the rest to be equally divided amongst them.

"THOMAS W. CATTRALL.

"Signed and sealed in the presence of us.

"MARY SMITH.

"SARAH HIND JOY."

It appeared from Mary Smith's affidavit that the whole of the writing, except the names of the attesting witnesses, was in the handwriting of the deceased, and that shortly before his death the deceased had written the last paragraph in her presence and had duly executed it; the rest of the writing being there at the time.

Mr. G. H. Cooper moved the Court to grant probate of the whole of the paper writing, as a will and codicil, to the executor named in the codicil. A doubt had been felt in the registry whether the part beginning "I hereby appoint," and ending "19th day of June, 1863, Thomas W. Cattrall," ought to be included in the probate. He submitted that all the writing which followed the execution of the will must be taken as a continuous disposition of property, duly executed at the foot or end; that it was written at different times is immaterial. This case is distinguishable from *Willmott (deceased)*, 1 Sw. & Tr. 36.

SIR J. P. WILDE: I think the application should be granted. Here is a duly executed will, followed by a number

of additions and alterations, at the end of which appear the signatures of the testator and of attesting witnesses, and an attestation clause. To what do the signatures and attestation clause apply? The presumption is that they apply to all that stood written above them at the time they were placed there; and there is nothing in the affidavit of the attesting witness, or from any other source, to rebut that presumption. Probate of the whole as a will and codicil will therefore be granted.

1863.

December 15.

In the Goods of
CATTRALL.

ROADNIGHT v. CARTER AND ANOTHER.

December 15.

Terms of Compromise before Trial.—Rule of Court.—Practice.

ROADNIGHT
v.
CARTER AND
ANOTHER.

When a suit is compromised before trial, the Court will not make the terms of compromise a rule of Court, as it has no power to enforce compliance with the terms; but It will make an order that the contentious proceedings be discontinued, and that the terms of compromise be filed in the Registry.

The defendants were executors of the will and codicil of Thomas Roadnight (deceased), and had taken probate of the same in common form. They had been cited by the plaintiff, as widow of the deceased, to bring the probate in, and to prove the will and codicil in solemn form. They had accordingly propounded the will and codicil in a declaration, to which the plaintiff had pleaded. The case had since been compromised, and the parties had signed terms of compromise in writing, by which it was agreed that the plaintiff should abandon further proceedings; that the probate was to be delivered out to the defendants, and that subject to the payment of the defendants' costs out of the estate, the property was to be divided equally between the plaintiff and E. Carter,

1863. wife of one of the defendants, the person principally interested
December 15. under the will and codicil.

ROADNIGHT
v.
CARTER AND
ANOTHER.

Dr. Wambey, for the defendants, moved for the terms of compromise to be made a rule of Court on the plaintiff withdrawing her pleas, and for the probate to be delivered out to the defendants.

Dr. Tristram, for the plaintiff, consented to the motion.

SIR J. P. WILDE: There is an objection to making the terms of compromise a rule of Court. If they were made a rule of Court, and not complied with, they might be such as the Court has no power of enforcing; the proper order for the Court to make will be, that contentious proceedings in the suit be discontinued, that the probate be delivered out to the defendants as executors, and that the terms of compromise agreed upon be filed in the Registry.

Order accordingly.

1864.

January 16.

In the Goods of
FRANCIS
MORTON.

In the Goods of FRANCIS MORTON.

Appointment of Guardian.—Probate.—12 Car. 2, c. 24, s. 8.
—Practice.

A paper purporting to be a last Will and testament duly executed, but containing simply an appointment of a guardian of his children by a father, and not disposing of personal property, nor appointing an executor, is not entitled to probate.

Francis Morton, the deceased in this case, made and duly executed a will, commencing, "This is the last will and testament of me, Francis Morton, of Liverpool, etc., which I

"make this 5th day of February, 1857. I constitute and 1864.
 "appoint my dear wife sole guardian of all my infant children January 16.
 "during their respective minorities." The will did not con- In the Goods of
 tain any disposition of property, or the appointment of an FRANCIS
 executor. The deceased left no other testamentary instru- MORTON.
 ment.

Mr. Kemplay moved the Court to decree letters of adminis-
 tration of the personal estate of the deceased with said will an-
 nexed, to be granted to Mrs. Morton as his widow. It must
 be admitted that the decisions are against the motion. In
Lady Chester's Case, 1 Ventris, 207, *S. C.* 3 Keble, 30, the
 Ecclesiastical Court was prohibited by the King's Bench from
 proving a will simply appointing a guardian. There was a
 later case (*Gilliat v. Gilliat and Hatfield*, 3 Phill. 222), where
 the Court said that it was not necessary that such a will
 should be proved.

SIR J. P. WILDE: The case in Ventris is conclusive. The
 principle on which it depends is also clear. The jurisdiction
 of this Court to grant probate of an instrument is founded on
 the fact that it affects personal property. This paper does
 not affect personal property, and therefore is not entitled to
 probate.

Motion rejected.

In the Goods of NATH. DAVID SCOTT WALLICH (deceased). February 2.

Will.—Executors.—Codicil.—Executors in India.

In the Goods of
 NATH. DAVID
 SCOTT
 WALLICH.

W. made a Will in England in 1861, and appointed B. and C. executors
 thereof. In May, 1862, being in India, he made a codicil, and on
 the 9th of June executed a paper, whereby he appointed E. and F.
 "my executors in this country."

1864. The Court held, that the context of the paper, giving the testator's reasons for the appointment of E. and F., showed that he did not mean them to have any power over his property in England, and granted probate to B. and C., without reserving power to E. and F.

February 2.

In the Goods of
NATH. DAVID
SCOTT
WALLICH.

In this case the deceased, an army-surgeon in India, died at Dugshai, in India, in 1863. When in England, in 1861, he duly made and executed a will, whereof he appointed his brother, G. C. Wallich, and his sister, S. M. Wallich, executor and executrix. On the 26th of May, 1863, he executed a codicil at Dugshai, and on the 9th of June, 1863, he executed a paper in the following words:—"And I further desire that my affairs may not be placed in the hands of the Administrator-General, as is the usual custom in this country, but that they may be managed entirely by my friend Colonel C. T. Chamberlain, 1st Bengal Cavalry, and F. Cooper, Esq., C.B., Deputy-Commissioner of Delhi, whom I hereby appoint my executors in this country, and who are to be responsible only to my executors at home."

The codicil and this latter paper had been sent to England, and—

Dr. Swabey now moved, on behalf of the executors named in the will, for probate of all the papers to be granted to them, without reserving power to the executors appointed by the last paper. The Court will probably be able to decide this case without determining whether the appointment of executors in a country is equivalent to their appointment for a country.

SIR J. P. WILDE: I think, from the context of the paper in which the executors in India are appointed, it is clear that the deceased did not intend them to have any power over his property in England, and the probate may go to the executors named in the will, without reserving power to the others.

In the Goods of MORLEY (deceased).

1864.

March 16.

*Administration to Attorney of Party entitled.—Form of
Authority.*

In the Goods of
MORLEY.

If the Court, on the documents before it, is satisfied that the party entitled to a grant of administration desires the person applying to act as his attorney, it will not require a regularly executed power of attorney.

William James Morley died a bachelor, and intestate. His father, who was resident at Victoria, had, by a document which purported to be sealed, but which had no seal upon it, authorized C. E. Morley to take out administration on his behalf. In lieu of a seal there was a small round mark in ink. It appeared from the affidavit of C. E. Morley, and from letters of the father of the deceased, that the application was made *bonâ fide*, and that it was the intention of the latter that the document should operate as a formal power of attorney, and that the applicant should on his behalf administer the deceased's estate.

Dr. Spinks now moved the Court to grant letters of administration to C. E. Morley, as the attorney of the father, and for his use and benefit, etc. If the Court feels any difficulty in treating the document as a power of attorney, the grant may be made under the 73rd section.

SIR J. P. WILDE: If a regular power of attorney had been absolutely necessary, I am not prepared to say whether I could have acted upon this document, although the Court of Queen's Bench, in *Reg. v. The Inhabitants of St. Paul's, Covent Garden*, 7 Q. B. Rep. 232, held that an impression in ink made with a wooden block in the usual place for a seal was sufficient where the document purported to be given under the hands and seals of the justices, and was in fact

1864. signed and delivered by them. The Ecclesiastical Courts,
March 16. however, have acted upon something much short of a regular
In the Goods of sealed power of attorney in such a case as the present, when
MORLEY. satisfied that it was intended that the person applying for the
grant should act as attorney (*In the Goods of Elderton*,
4 Hagg. 210; and *In the Goods of Ormond*, 1 Ibid. 145).
In this case I am quite satisfied that the deceased's father in-
tended to give the applicant power to take out administration,
and upon the authority of those cases I will make the grant.

Motion granted.

May 3.

In the Goods of BOYLE (deceased).

In the Goods of
BOYLE.

Executor.—Renunciation.

The renunciation of an executor need not be under seal.

Andrew Boyle died on the 1st of January, 1864, in London, leaving eight children, all under age. On the 3rd of January, 1862, the deceased, at Calcutta, had executed his will in duplicate. By it he appointed the Administrator-General of Bengal for the time being his executor; and after directing the payment of his debts, etc., he gave one-fifth of all his realty and personalty to his wife, and the residue to the Administrator-General of Bengal for the time being, in trust for the benefit of his children. One of the duplicates was left at Calcutta, the other was in the custody of the deceased's wife. The deceased left personal property in Bengal and in England. The Administrator-General of Bengal, in a letter of the 8th of March, 1864, to the testator's widow, renounced probate of the will in England.

Dr. Spinks moved the Court, under the 20 & 21 Vict. c. 77,

s. 73, to grant letters of administration of the personal estate in England with the will annexed to the testator's widow. 1864.
May 3.

In the Goods of
BOYLE

SIR J. P. WILDE: The only question is whether the renunciation of an executor must be under seal. In Williams on Executors, 5th edit. p. 247, it is said, "If the executor send a letter to the Ordinary by which he renounces, and the refusal be recorded, it is sufficient." It seems to me that that is good sense. A power of attorney need not be under seal, and I think that so also a renunciation need not be under seal. Upon the letter of the Administrator-General of Bengal being recorded in Court as his renunciation, the grant may go.

Motion granted.

In the Goods of SARAH KIMPTON, Widow (deceased).

March 15.

Dispositive Part of Testamentary Instrument.—Position of Signature.—15 & 16 Vict. c. 24.

In the Goods of
SARAH
KIMPTON.

Where, from the obvious sequence and sense of the context, it appears to the satisfaction of the Court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate.

S. P. Wilde
625/102

This was a question as to the due execution of a codicil. The will of the deceased, dated the 19th of February, 1861, occupied the first three sides of a sheet of foolscap paper. A codicil of the same date as the will occupied the upper half of the last side. On the fourth or lower quarter of the last side, a second codicil commenced; the words at the bottom of the side being, "In witness whereof, I the said," continued at the third quarter of the last side, as follows:—"Sarah Kimp-

1864. "ton, the testatrix, have hereunto set my hand, the 28th day
 March 15. "of December, 1863, as and for a codicil to my said last will;
 In the Goods of "and further, I give all my books of a religious tendency to
 SARAH "be equally divided between my said children.
 KIMPTON.

"SARAH KIMPTON."

Attestation clause and subscriptions of witnesses.

So that on the sheet of paper being unfolded, the chief dispositive part of the codicil was literally underneath the signature of the testatrix, though the sequence of the context was obvious enough.

The Wills Amendment Act, 15 & 16 Vict. c. 24, provides that "no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it."

From the affidavit of Mr. James Fordham Green, solicitor, of Hare, it appeared that he was called in when the testatrix was extremely ill, and having received instructions from her for the codicil in question, began to write it as it appeared on the lower part of the fourth side of the sheet of paper which contained the will and first codicil, and not having room to finish it at the bottom of the side, carried on the writing to the unoccupied part of the paper above; the deceased being then in such a state as made it desirable to get the codicil executed with as little delay as possible.

Mr. Le Breton moved the Court for probate, including the last codicil. The signature, even if literally above part of the codicil, in construction and sequence of sense follows it.

SIR J. P. WILDE: I think this codicil ought to be included in probate. It is entirely within the spirit of the Wills Act and the Amendment Act referred to. It may not be possible to lay down any general rule for the construction of the proviso in the Amendment Act, but I am inclined to say that where any portion of the writing appears to the satisfaction of

the Court to form part of the context, anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different. I think, from the case of *Martha Peach, deceased*, 1 Swab. & Trist. 138, that the late Sir C. Cresswell was inclined so to hold, though it does not appear that that case was brought to a final decision.

1864.

March 15.

In the Goods of
SARAH
KIMPTON.

In the Goods of WOODLEY (deceased).

April 19.

Will.—Execution.—Signature at Foot or End.—Signature written on last Lines of Will.—1 Vict. c. 26, s. 9.

In the Goods of
WOODLEY.

The testator's signature to his Will was written partly across the last line but one of the Will, and entirely above the last line, with the exception of one letter which touched the last line.

Held, that the Will was signed at the foot or end thereof.

Matthew Woodley died on the 28th of February, 1864, leaving a testamentary paper, bearing date February 23rd, 1864, signed by him and duly attested. The only question was, whether it was signed "at the foot or end thereof."

The last three lines of the will were as follows:—

"to and I hereby appoint
my sister Elizabeth Blackburn,
of this
Executrix my will."

The signature of the testator was written in a direction slanting downwards, commencing just under the beginning of the word "appoint" in the last line but two, and extending downwards, over the latter part of "Elizabeth," in the last line but one, the tail of the "y" at the end of his signature touching the last line.

1864. On the 23rd of February, at the request of the deceased,
 April 19. who was then in a dying state, a surgeon who was attending
 In the Goods of him drew up the will, he then directed the testator to sign his
 WOODLEY. name at the foot or end thereof, and he endeavoured to do so
 as well as he was able whilst lying in bed.

Dr. Tristram moved the Court to decree that probate of the will be granted to Elizabeth Blackburn as executrix. There is no case precisely in point, but I submit that this will is signed at the foot or end thereof within the meaning of the Wills Act. The object of the Legislature in requiring that a testamentary paper should be signed at the foot or end thereof, was to prevent the possibility of fraudulent interpolations between the will and the signature of the testator after execution (*Smee v. Bryer*, 6 Moore, P. C. C. 404).

SIR J. P. WILDE: Each case of this description depends upon its own particular circumstances. In the present case the last clause of the will appointing an executrix comes down to the bottom of the paper. Part of the testator's signature touches the last line but one and part touches the last line. Looking at this paper, I think that the signature cannot be said to be otherwise than at the foot or end of the will, and that the last words should be included in the probate, as forming part of the will.

May 8.

BRAMLEY AND ANOTHER v. BRAMLEY.

BRAMLEY AND
 ANOTHER
 v.
 BRAMLEY.

Costs of Unsuccessful Opposition to Will.—No Order as to Costs.—Reasonable Ground for Litigation.

Where the Judge of Assize was satisfied with a verdict for the plaintiffs establishing a Will, but would not have been dissatisfied with

a contrary verdict, the Court refused to condemn the defendant in costs. 1864.
May 3.

The plaintiffs propounded a will. The defendant pleaded 1. Undue Execution. 2. Incapacity. 3. Undue Influence. The issues joined on these pleas were tried before J. Blackburn at the Yorkshire Spring Assizes, 1864, and were all found for the plaintiffs. BRAMLEY AND
ANOTHER
v.
BRAMLEY.

Mr. Kemplay moved the Court to pronounce for the will, and to condemn the defendant in costs. April 29.

Mr. J. B. Maule contra.

SIR J. P. WILDE: This case was tried before J. Blackburn at York, and the will was established. A motion was made to condemn the defendant in costs. The learned judge thinks that the verdict was quite right, and is satisfied with it, but at the same time is of opinion that the evidence was such, that had the jury found the other way, he would not have been dissatisfied with their verdict. Under these circumstances I think there was a reasonable ground for the litigation. The defendant therefore will not be condemned in costs. May 3.

In the Goods of GEALE (deceased).

June 7.

Probate.—Testator Deaf, Dumb, and Illiterate.—Evidence of Signs by which Assent to the Will was signified. In the Goods of
GEALE.

Where probate was sought of the Will of a testator who was deaf, dumb, and illiterate, the Court required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the Will, before making the grant.

John Geale, late of Yately, in the county of Hants, yeoman, died on the 25th of January, 1864, leaving a will of the 4th

1864. of July, 1861. He was deaf and dumb, and could neither
 June 7. read nor write, and had executed the will by mark. It was

In the Goods of in the following terms :—
 GEALE.

“ This is the last will and testament of me, John Geale, of
 “ Yately, in the county of Hants, yeoman. I devise and be-
 “ queath all the real and personal estate whatsoever to which
 “ I may be entitled, or over which I may have any disposing
 “ power at the time of my death, unto my wife, Martha
 “ Geale, absolutely; but if my said wife shall die in my life-
 “ time, then I devise and bequeath all the same real and per-
 “ sonal estate unto my said wife’s daughter Eliza, the wife of
 “ William Wigg, of No. 52, Carlton Street, Camden Town, in
 “ the county of Middlesex, absolutely; and if my said wife
 “ and the said Eliza Wigg shall both die in my lifetime,
 “ then I devise and bequeath all the same real and personal
 “ estate unto the said William Wigg, absolutely; and if all of
 “ them—my said wife and the said William Wigg and Eliza
 “ his wife—shall die in my lifetime, then I devise and be-
 “ queath all the said real and personal estate to such children
 “ or child of the said William Wigg and Eliza his wife as
 “ shall be living at my decease, and shall then have attained,
 “ or shall thereafter attain, the age of twenty-one years, to
 “ be equally divided between them if more than one; and I
 “ appoint my said wife, or, if she shall die in my lifetime,
 “ then the said William Wigg, and if both he and my wife
 “ shall die before me, then the said Eliza Wigg, executrix or
 “ executor of this my will. In witness, etc.”

Affidavits of Martha Geale, the deceased’s widow, and of
 R. T. Dunning, a wine merchant, and Isaac Hilton, parish
 clerk, the attesting witnesses, were filed. They deposed that
 the deceased was shrewd and intelligent, and possessed of con-
 siderable mechanical skill and ingenuity. The deponents had
 all known him intimately for more than thirty years, and he
 was in the habit of conversing with them, and they with him,
 by signs, which were well understood by all of them.

The deceased had, in August, 1853, made a will, by which he devised and bequeathed all his real and personal estate to his wife absolutely. In June, 1861, he, by signs, told his wife to take the will to Mr. Sheppard, a solicitor, and to instruct him to prepare for him a fresh will to the effect of the will above set out. Mr. Sheppard accordingly drew up the will of July, 1861, and sent it to the deceased.

1864.

June 7.

In the Goods of
GEALE.

On the 4th of July, 1861, the attesting witnesses were sent for; the deceased then by signs told them that he was about to make his will, and wished them to witness it. He then produced the will, and told them by signs how he wished to dispose of his property. Dunning then read over the will, and ascertained that it was in accordance with his instructions, and then by signs explained to the deceased its contents and effect, and he by signs signified his approval.

Dr. Spinks moved for probate on these affidavits, and cited *In the Goods of Owston*, 2 Sw. and Tr. 461.

SIR J. P. WILDE: In that case Sir C. Cresswell refused to grant probate on motion of the alleged will of a deaf and dumb person, on the ground that it did not appear upon the affidavits that the deceased had used the deaf and dumb alphabet, or what signs had been used in the conversation with him. The same objection may be made to the affidavits in this case.

Dr. Spinks: I am instructed that the deaf and dumb alphabet was not used. The affidavits, however, show that the deceased understood and approved the contents of the will. That is sufficient.

SIR J. P. WILDE: I shall decline to grant probate on motion upon the affidavits now before me. The deponents must state the nature of the signs used in their communication with the deceased.

1864.

June 7.

In the Goods of
GEALK.

Dr. Spinks afterwards renewed the motion upon the joint affidavit of the widow and the attesting witnesses; which, in substance, was as follows:—"The signs by which deceased informed us that the will was the instrument which was to deal with his property upon his death, and that his wife was to have all his property after his death, in case she survived him, were in substance, so far as we are able to describe the same in writing, as follows:—viz., the said John Geale first pointed to himself, then he pointed to himself, and then he laid the side of his head upon the palm of his right hand, with his eyes closed, and then lowered his right hand towards the ground the palm of the same hand being upwards. These latter signs were the usual signs by which he referred to his own death, or the decease of some one else. 2. He then touched his trousers pocket (which was the usual sign by which he referred to his money), then he looked all round and simultaneously raised his arms with a sweeping motion all round (which were the usual signs by which he referred to all his property or all things). 3. He then pointed to his wife, and afterwards touched the ring-finger of his left hand, and then placed his right hand across his left arm at the elbow, which latter signs were the usual signs by which he referred to his wife. 4. The signs by which the said testator informed us that his property was to go to his wife's daughter in case his wife died in his lifetime, were in substance, and so far as we are able to describe them in writing, as follows:—He first referred to his property as before; he then touched himself and pointed to the ring-finger of his left hand and crossed his arm as before (which indicated his wife); he then laid the side of his head on the palm of his right hand (with his eyes closed) which indicated his wife's death; he then again, after pointing to his wife's daughter who was present when the said will was executed, pointed to the ring-finger of his left hand and then placed his right hand across his left arm at the elbow

“as before; he then put his forefinger to his mouth and immediately touched his breast, and moved his arms in such a manner as to indicate a child, which were the usual signs for indicating his wife’s daughter—he always indicated a female by crossing his arm and a male person by crossing his wrist. 5. The signs by which he informed us that his property was to go to William Wigg, his wife’s daughter’s husband, in case his wife’s daughter died in his lifetime, were in substance, and so far as we are able to explain the same, as follows:—he repeated the signs indicating his property and his wife’s daughter, then laid the side of his head on the palm of his right hand, with his eyes closed, and lowered his hand towards the ground as before (which meant her death), he then again repeated the signs indicating his wife’s daughter, and crossed his left arm at the wrist with his right hand, which meant her husband, the said William Wigg. He also communicated to us by signs that the said William Wigg resided in London. The said William Wigg is in the employ of and superintends the goods department of the North-Western Railway Company at Camden Town. 6. The signs by which the said testator informed us that his property was to go to the children of his wife’s daughter and son-in-law, in case they both died in his lifetime, were in substance, and so far as we are able to describe the same in writing, as follows,—namely, he repeated the signs indicating the said William Wigg and his wife, and their death before him, and then placed his right hand open a short distance from the ground, and raised it by degrees, and as if by steps, which were his usual signs for pointing out their children, and then swept his hand round with a sweeping motion, which indicated that they were all to be brought in. The said testator always took great notice of the said children, and was very fond of them. 7. After the testator had, in manner aforesaid, expressed to us what he intended to do by his said will, the said R. T.

1864.

June 7.

In the Goods of
GEALE.

1864. "Dunning, by means of the before-mentioned signs, and by
 June 7. "other motions and signs by which we were accustomed to
 In the Goods of "converse with him, informed the said testator what were the
 GRALE. "contents and effect of the said will."

SIR J. P. WILDE granted the motion.

Thomas Freeman 3 Dec 68

June 7.

PARKER v. HICK.

PARKER
 v.
 HICK.

Practice.—Attachment against Married Woman.

An attachment will not be granted against a married woman for disobedience of an order for payment of costs, if she has no separate property. But the onus of establishing that fact lies upon her; and if she does not appear upon a motion for an attachment, of which she has had notice, the Court will grant the attachment.

Dr. Spinks moved for an attachment against the defendant, a married woman, for non-payment of costs, pursuant to order. The defendant had had notice of the motion, but did not appear.

SIR J. P. WILDE: The only question is, whether, as the defendant is a married woman, an attachment should be granted. At common law a *ca. sa.* may be sued out against a married woman; but she will be discharged from custody upon proof that she has no separate property. If the defendant has no separate property, she is not liable to attachment. But the onus of establishing that fact lies upon her, and as she has not thought fit to appear on this motion, I shall allow the attachment to issue; but it must lie in the registry for a week.

WILLIAMS v. DAVIES.

In the Goods of JOHN WILLIAMS (deceased).

*Citation to Accept or Refuse Administration.—Order to Pay
Costs.—Attachment.—Assets.*

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April 29 and
May 31.

WILLIAMS

v.

DAVIES.

In the Goods of
JOHN
WILLIAMS.

The Court will not consider the question of issuing an attachment for non-payment of a sum of money ordered to be paid, till personal service of the order has been made, or it is shown that personal service is evaded.

An order on a person as administrator to pay costs is equivalent to an order to pay out of the deceased's estate, and if the assets have been properly exhausted, no attachment will be granted for disobedience to such order.

SEMPLE, an administrator might be guilty of such misconduct as to make him personally liable for costs, but mere delay in taking out administration is not such misconduct.

This was an application for attachment. John Williams, minor, died on the 15th of September, 1862, without child, leaving Mary Williams, his widow, him surviving. She afterwards married David Davies, and was the defendant in this case. On 11th of November, 1863, the plaintiff, a brother of the deceased, took out a citation calling upon Mrs. Davies to accept or refuse administration to the estate of her late husband; Mrs. Davies took administration on the 20th of November, the effects being sworn under £20.

On the 19th of January, 1864, an order was made on summons that the costs of the plaintiff should be paid out of the estate of the deceased, and on the 22nd March an order was made upon the defendant as administratrix of the deceased to pay to the plaintiff's proctor, within six days after service, £11. 4s. 11d., the plaintiff's taxed costs and the costs of the summons.

On the 29th of April *Dr. Spinks* moved for an attachment

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 May 31.
 ———
 WILLIAMS
 v.
 DAVIES.
 In the Goods of
 JOHN
 WILLIAMS.

against the defendant for not having obeyed the above order. The order to pay had not been personally served, but left with the defendant's proctor; for the sufficiency of this service he relied upon the following rules for contentious business:—

27. The entry of the appearance of a party shall be accompanied by an address within three miles of the General Post-Office.

28. *Service of Pleadings, etc.*—It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and orders, at the address furnished as aforesaid by the plaintiff and defendant respectively.

There is no special rule as to the service of an order to pay a sum of money.

SIR J. P. WILDE: An attachment is a serious matter. I do not think the rule referred to can apply to the service of an order which is the ground of depriving persons of their liberty. I shall not consider the question of attachment till there is a personal service of the order, or till I am satisfied that personal service is being evaded.

On 31st of May *Dr. Spinks* renewed the motion, personal service having been effected and the money not paid. The defendant by her delay in taking out administration obliged the plaintiff to have recourse to the process of this Court, and the defendant must be liable for the expense so incurred.

Dr. Swabey for the defendant: The order is upon her as administratrix, she is therefore not liable beyond the assets which have come into her hands as such administratrix. By her affidavit it appears that the only property left by the deceased consisted of £15 worth of household furniture, and that the defendant had paid beyond that sum for the funeral expenses of the deceased, for bills owing by him, and for the

cost of taking out administration. During the deceased's life-time he had deposited £100 in a bank, at Abergavenny, in the joint names of himself and the defendant as a provision for her. This sum she was advised belonged to her on the death of the deceased, and formed no part of his estate. The bank had paid it to her on her demand. It is submitted, that in this view, the defendant was at least *prima facie* in the right (1 Bright's 'Husband and Wife,' edit. 1849, p. 32). And it lies on the plaintiff to show that the £100 formed part of the deceased's estate, which he has not done.

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JOHN
WILLIAMS.

SIR J. P. WILDE: I am asked to issue an attachment against an administratrix for not having obeyed an order to pay certain costs. An order upon her as administratrix is, I think, equivalent to an order to pay out of the deceased's assets. From her affidavit it appears that she has no assets; that she properly spent more than she received from the husband's estate. The £100 standing in their joint names is hers by survivorship. It is said that she should pay the plaintiff's costs herself, but the order was not asked to that effect, or if it were it was refused. I do not say that there may not be such misconduct of an administratrix as to make her liable out of her own means, but mere delay in taking out the administration is not sufficient.

In the Goods of THOMAS REED (deceased).

Administration Bond.—Limited Grant of Administration to a Party out of Jurisdiction of Court.—Acceptance of Justifying Sureties also Resident without the Jurisdiction of the Court (in Jersey).—Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 18.—Practice.

May 26.
—
In the Goods of
THOMAS REED.

Where a limited grant of administration had been made to a person

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May 26.

In the Goods of
THOMAS REED.

resident without the jurisdiction of the Court, who was unable to procure justifying sureties within its jurisdiction, the Court accepted sureties resident in Jersey.

The deceased, in this case, Lieut.-Colonel Reed, died in Jersey intestate without any known relation, leaving his widow him surviving, who declined to administer to his estate. Shortly before his death he assigned a policy, granted on his own life, for £500, by the Gresham Life Assurance Company, London, to Mr. Philip Le Brun, a merchant in Jersey, for valuable consideration. The Court on motion decreed administration of the personal effects of the deceased, limited to the policy, to Mr. Philip Le Brun as assignee of the policy, and directed that the sureties to the administration bond should justify.

May 3.

Dr. Tristram : Mr. Le Brun has been unable to procure sureties in England who are able and willing to justify. He has tendered two responsible persons resident in Jersey, as sureties, who are willing to justify, but an objection has been taken to them in the registry, on the ground that they should, according to the practice of the Court, be resident within its jurisdiction, as the administrator resided without the jurisdiction of the Court. He was instructed, but he had no affidavit to this effect, that by the law of Jersey there would be no more difficulty in enforcing the bond against the sureties there, than if they were resident in England.

Motion adjourned for Affidavit.

May 26.

Dr. Tristram renewed the motion upon an affidavit by a solicitor practising in Jersey, showing that proceedings by an assignee of the bond might be taken against the sureties in the Royal Court of Jersey for a breach of the condition of the bond, or on a judgment obtained in England (in an action) on the bond which might be brought, as now by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 18, the sureties might

be served with a writ in Jersey. He relied upon the principle of the decision *In the Goods of Ballingall*, deceased, L. J. Pr. Mat. and Adm., in which sureties resident in Scotland had been accepted on the suggestion made by him *per incuriam*, that they could be served there with a writ under the Common Law Procedure Act.

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SIR J. P. WILDE: I will grant the motion. The principle laid down in the case of the goods of Ballingall, although inapplicable to the facts of that case, is applicable to the present one, and is an authority, if one were required, for my granting this motion.¹ But without an authority, the good sense of the thing shows that the usual rule may here be relaxed.

¹ In the Goods of WILLIAM BALLINGALL (deceased).

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Administration to Attorney out of Jurisdiction.—Sureties out of Jurisdiction.—15 & 16 Vict. c. 76, s. 18.

In the Goods of
WILLIAM
BALLINGALL.

The Court is at liberty to accept as sureties to an administration-bond persons resident out of its jurisdiction, when the principal, who is also residing without the jurisdiction, is unable to procure sureties within the jurisdiction, provided a writ of summons is servable on the sureties under sect. 18 of the Common Law Procedure Act (17 & 18 Vict. c. 77).

William Ballingall died July 18, 1862, leaving a will, whereby he gave all his property to Eliza, wife of John Stuart, and to Geo. R. Ballingall, as tenants in common, and he appointed the said G. R. Ballingall and J. Stuart (one being resident in Bombay and the other in Melbourne) his executors. They had, by a power of attorney, authorized J. Anderson and G. B. Anderson, of Blairgowrie, Perthshire, to obtain letters of administration, with the will annexed, for their use and benefit. The Messrs. Andersons had offered two persons as sureties to the administration bond who also resided at Blairgowrie. The registrar had declined to accept them as sureties, on the ground that both they and their principal were residing out of the jurisdiction of the Court.

Dr. Tristram moved for the grant to pass to the Messrs. Andersons, notwithstanding the sureties to the bond were resident in Scotland.

*omitted
Anglin v. H. L. L. L.*

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QUICK v. QUICK AND QUICK.

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QUICK AND
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Will Lost or Destroyed.—Declarations of its Contents by Testator after Execution.

Evidence of the declarations of an alleged testator as to the contents of a Will not forthcoming, made after its execution, is not admissible to prove the contents.

In this case the plaintiff, the widow of Henry Brennan Quick, the deceased in the cause, propounded the contents of a will which could not be found. The declaration alleged the due execution, etc., of the will on the 22nd of December, 1860, "and that the said will, never having been revoked or

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In the Goods of
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In the Prerogative Court it had been the practice, where a grant was made to an attorney not resident within the jurisdiction of the Court, to require, that the sureties to the bond should be resident within its jurisdiction. This was a reasonable rule, when established, for then, if a bond were assigned for a breach of its conditions, the assignee of the bond could not have served the sureties out of England with process. But this rule did not apply now, as by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 18, service on a person out of England¹ may be effected. Again, as the whole of the property of the testator passes to the executors, to one in his own right and to the other *jure mariti*, they do not require sureties to protect them against the acts of their own attorneys. The only object of sureties here would be to protect creditors, who would have remedies against the executors, their attorneys and sureties, for a devastavit. As by the 81st section of the Probate Act the Court has power to dispense with sureties altogether, surely it may relax the old rule in this case for the two reasons given.

SIR C. CRESSWELL: I think there is some weight in the argument, that there is not now the same necessity as formerly for requiring that the sureties to the bond should be resident within the jurisdiction of the Court. The circumstances of this case are peculiar, and I think that the sureties proposed may be accepted.

Motion granted.

¹ "In any place except in Scotland or Ireland."

*John L.
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J. L. L. L.
L. J. x 45 277*

"destroyed by the testator, nor by any other person in his presence and by his direction, is still valid, but that the same cannot be found. That the substance of the will was and is as follows, to wit:—The said Henry B. Quick, by his said last will and testament, devised and bequeathed to his wife, the said Mary Jane Quick, all his real and personal estate whatsoever and wheresoever, and appointed the said Mary Jane Quick guardian of Louisa Quick, his infant daughter by his former wife."

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The defendants, who were infants and appeared by their guardians, amongst other things, pleaded the revocation of the said will by destruction, and, further, that the sum and substance of the said alleged will was not as set forth in the declaration.

The cause was tried before Sir J. P. Wilde, without a jury. June 4.

The plaintiff stated, in examination: Her husband was a solicitor. She was married to him, at Guildford, on the 22nd of December. 1860. He was then a widower, having a daughter, by his former wife, aged four. There was no settlement made on the marriage. Before the marriage she told him she did not require one, and he thereupon said, "Then I shall make my will." On their return to her house from the church, and before the wedding breakfast, he asked Mr. Charles Bond and Mr. Henry Bond to go with him into another room to attest his will. They accompanied him into the breakfast-room. He told her on that or the next day the contents of the will. He said, "I have left you all mine, as I consider my daughter quite provided for. I have appointed you her guardian." They went first to reside at Waterloo Terrace, London. The deceased was in the habit of attending daily at his office. It was his practice to carry a leather bag to and from his office. He kept the package containing the will in this bag. He once asked her to keep it, in case the bag should be lost; she

1864. declined. He met with an accident on the 28th of January,
June 9. 1861. His memory became impaired after that accident.
QUICK They subsequently went to reside at No. 7, Lawn Road, Ha-
VERSTOCK HILL, where they resided until his death, on the 19th
of May, 1863. After their removal there, he continued to go
to his office, carrying the bag. In February, 1862, she had a
daughter born, called Alice. Some time after her birth he said,
“I don’t know where to put my hand on that will. Did I
“give it to you?” She said, No. He went into his dressing
room to look for it in a place where he thought it might be,
but did not find it. Shortly before the commencement of his
last illness (which lasted a fortnight), he said to her, “I have
“left all my property to you, but I wish Alice to have all
“mine, because her sister is already provided for;” meaning
that she was to leave it to her. She suggested that he should
make another will, leaving her a life interest in the property.
He said he would consider about it, and made a memorandum
to remind him of it. A few days afterwards she asked him if
he had drawn up a new will. He said, No, he should not alter
it. During his last illness he spoke of his will and said it
could not be lost, and said if he had the use of his hands (he
was suffering from rheumatic fever) he would make another
just like it. Their house was broken into on the 16th of De-
cember, 1862. She missed her jewel-case, and a dressing-
case belonging to the deceased, not the one he had in use. After
his death the will was searched for and could not be found.
She took out letters of administration to his estate. She did
not then know that any one else knew of the contents of the
will besides herself.

Charles Kemble, a convicted felon and a notorious burglar,
who was now undergoing fifteen years’ penal servitude for
burglary, stated :—On the 16th of October, 1862, he and an-
other man, whose name he declined to give, broke into the
house, 7, Lawn Road, Haverstock Hill. They went into the

front bedroom and opened a dressing-case found there. There was a large envelope in the central compartment, indorsed "H. Quick. This is my will." They opened it. It was written on two or three sheets. His companion read part of it and was for keeping it, but at his suggestion it was burnt.

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Charles Bond, one of the attesting witnesses, who was examined on commission, stated :—He was present at the second marriage of the deceased (and he then proved the due execution of a will after the wedding). The will was not read over at the time. He never read it. The deceased said nothing then about its contents. About a month after the marriage, the deceased told him he had left all his property to the plaintiff.

— Quick, a brother of the deceased, said he had a conversation with Charles Bond on the day of the deceased's funeral, when he stated he had witnessed the will, but knew nothing of its contents.

Dr. Spinks (with *Mr. E. James*, Q.C.), for the plaintiff, submitted :—(1.) There was no revocation. No act had been done by the deceased, or by any one else by his direction, revoking the instrument. The evidence of its destruction, together with the evidence of his declarations of adherence to it up to his death, were conclusive on this point. (2.) The contents of the instrument were sufficiently proved. Where an instrument was shewn to have been lost, parol evidence was admissible to prove its contents. Declarations of the deceased were surely admissible for this purpose. In *Brooke v. Kent*, 3 Moore, P. C. 334, the declarations of the deceased were admitted to establish the substitution of one word for another. If valid to prove one word, they were equally so to prove the whole of a will.

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[*Per Curiam*: You have to grapple with the principle of law, that the contents of the lost instrument should be proved on oath. Here you only prove the declarations of the contents on oath. Is there any authority that declarations of a testator as to the contents of a will are equivalent to a proof of its contents on oath?]

In *Glen v. Burgess*, a servant learnt the contents by hearing the deceased read out the will, and was allowed to give evidence of them.

Mr. Karlake, Q.C. (Mr. Searle with him), for the defendants: (1.) There should have been distinct proof of the whole contents of the will. This has not been given. (2.) Declarations of the deceased as to the contents of the will made after its execution are inadmissible (*Doe dem. Shallcross v. Palmer*, 16 Q. B. 747; *In the goods of Ripley*, 1 Sw. & Tr. 268; *Staines v. Stewart and Jones*, 2 Sw. & Tr. 320).

Mr. E. James, Q.C., in reply.

Cur. adv. vult.

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Sir J. P. WILDE gave the following judgment: In this case the plaintiff, Mary Jane Quick, propounded the will of her late husband, Henry Brennan Quick, as made on the 22nd of December, 1860.

The will is not forthcoming and was not found at his death; but the plaintiff proposed to prove the due execution of the will by the evidence of the attesting witness, and to supply its contents by parol. No draft or copy of the will or any part of it, nor any document throwing any light upon its effect, is in existence; and the case is therefore one of that class in respect of which I made some observations in the late case of *Wharram v. Wharram*.

But the state of the evidence in this case will enable the Court to dispose of it without moving the main question there discussed. Mr. Bond proved that immediately after the mar-

riage the deceased called him and his son into a separate room, and in their presence executed a will. The plaintiff also proved that before his marriage a conversation was held between them, in which she said she did not require any settlement, and in which he said, "Then I shall make my will." The Court is satisfied that the deceased did execute a will on the day named.

The circumstance of this will not being found is calculated to give rise to many questions, and many difficulties must be successfully encountered before it would be entitled to probate.

The first of these is, what were its contents? I have already said that neither draft nor copy can be produced,—a somewhat remarkable circumstance, as the deceased was an attorney. Recourse was therefore had to other testimony. This testimony consisted entirely of statements or declarations supposed to have been made by the testator after the execution of his will as to the dispositions contained therein. These statements were made to the plaintiff herself and Mr. Bond, who deposed to them, and they were to the effect that he had left all his property to his wife. So far they both agree. Some further statements were made by the plaintiff alone, relative to a daughter by a former marriage. The Court has sought in vain for any principle or authority to justify the reception of such statements in evidence for the purpose of proving the actual contents of the absent will. It is familiar practice enough to receive the unsworn declarations of the testator in evidence, for the purpose of arriving at his general intentions where his competency is in dispute, or where there is any imputation of fraud in the making of his will. For in such cases the state of his mind and affections is in itself a material fact, of which such statements are the fair exponents. But where these declarations are vouched to prove, not only the testator's intentions, but the fact that he had declared and embodied those intentions in a certain will, they have no other title to confidence than the statements of any other person

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who had seen the will and could speak to its contents. In this aspect they become mere hearsay, and open to the well-known rule excluding them as such. On a similar principle it was held, *In the goods of John Peter Ripley, deceased*, 1 Sw. & Tr. 68, that the testator's declaration, that his will had been duly executed, was not admissible to prove that fact; and to the same effect in the case of *Doe dem. Shallcross v. Palmer*, 16 Q. B. 747.

The only case that could be produced to the Court on this point for the plaintiff was that of *Brooke v. Kent*, 3 Moo. P. C. But on a perusal of that case it will be found that the argument and judgment in it were both addressed to a very different question. The points then discussed and determined were, whether the will fell within the statute, though made in 1837, and whether the obliterations or alterations must, under the statute, have been made *animo revocandi* to defeat the original provisions of the will. But no reference was made to the admissibility of the testator's written declarations to prove the contents of the will. On the contrary, the effect of the judgment was only to admit the allegation in which the nature of the alteration was averred, and then the Court added, that "as it was intimated from the bar that the facts as pleaded were admitted," the will might at once receive probate.

These declarations being thus excluded, the Court has no evidence before it to prove what the will really contained. And as the plaintiff has thus failed to prove the sum and substance of the will as set forth in the declaration, there is nothing of which probate could be granted.

PODMORE v. WHATTON.

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Administration called in.—Sum and Substance of Will propounded.—Grant of Administration to the Residuary Legatee, who had established the Will.

Final v. Final

1 P. & D. 372

When the substance of a Will is propounded, the first point to be ascertained is whether such a Will was duly executed. If that is established, the next point is, whether it was in existence at the death of the deceased. If it was not, then the *prima facie* presumption that it was destroyed by the deceased, with intention to revoke, arises, which may be rebutted by further evidence.

In the present case the Court was satisfied, on the evidence, that the defendant, who had taken out letters of administration, had possessed himself of the Will after the death of the deceased, and had suppressed or destroyed it, and therefore decreed letters of administration with the Will annexed, as contained in a draft; and as the plaintiff and defendant were the residuary legatees in the Will, and as such equally entitled in usual course to the letters of administration, ordered the grant to be made to the plaintiff.

The deceased in this case, Emily Georgiana Whatton, died on the 4th of September, 1859, a spinster, without a parent, leaving the defendant, her brother, and next of kin. He took out letters of administration of the effects of the deceased as dead intestate, immediately after her death.

The grant of administration had been called in by Podmore, the plaintiff, who was a cousin of the deceased, who now propounded a draft of a will as containing the sum and substance of a will alleged to have been executed by her in January, 1853, in which the plaintiff and defendant were named as residuary legatees. This will was alleged to have remained unrevoked at the time of her death. The defendant pleaded a traverse of the execution of the will, and revocation.

The case was heard on the 28th of May and the 2nd of June, before the Court itself.

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Dr. Spinks and Mr. Pritchard for the plaintiff.*Mr. Huddleston, Q.C., and Mr. Lopes* for the defendant.

The defendant and the plaintiff were the nearest surviving relations of the testatrix at the time of her death. Her estate had realized about £470. The will left a legacy of £300 to Mr. Pritt, who had been her legal adviser, and divided the residue between the plaintiff and the defendant. Mr. Pritt, who was appointed executor, had renounced, and he agreed to give up £200 of his legacy to the plaintiff. The contents of the will and its due execution were clearly proved, and the only question was, whether the testatrix had destroyed it *animo revocandi*, or whether it was in existence at the time of her death, and had then been destroyed or suppressed by the defendant. The evidence on this point is stated in the judgment.

Cur. adv. vult.

SIR J. P. WILDE: The evidence in this case has raised an issue casting a duty not free from difficulty upon the Court. The plaintiff seeks probate of a certain draft of a will as containing the sum and substance of the will of Emily Georgiana Whatton. The will itself is not produced.

The first question is, did the deceased ever execute such a will? In the absence of the will itself this portion of the case requires clear, strong and irrefragable evidence, free from suspicion or doubt in its sources, exact and certain in its conclusions. The attorney who prepared it from her personal instructions, together with his partner and clerk who witnessed its execution, speak clearly and positively to the fact. They produce the original draft of the will. The books of the attorney's office are also produced, and the charges for drawing, engrossing, and executing the will are there found, which charges Miss Whatton afterwards paid. This testimony leaves no doubt in the mind of the Court, that a will, of which the

draft produced contains the substance, was actually and duly executed by Miss Whatton about the autumn of the year 1852.

The effect of the will was to bequeath a legacy to William Pritt of £300, and to divide the residue between the plaintiff, who was her cousin, and the defendant, who was her only brother. Although she thus made the defendant the object of her bounty, there was strong evidence from several witnesses to show that she regarded him with anything but kindly feelings. To more than one person, and on more than one occasion, she spoke of him as a bad son and an unkind brother. On the other hand, there was also strong evidence to show that she felt under obligations to Mr. Pritt, who had assisted her professionally.

The will having been thus made, the next and most important question is, what became of it? On the part of the plaintiff it was urged that this was an inquiry upon which the Court was not bound to enter; that the will, once made, could only be revoked by the specific methods indicated in the Wills Act; and that, unless the defendant established its revocation, the Court was bound to pronounce it unrevoked, and admit it to probate. On the part of the defendant it was argued that, as the will itself was not forthcoming, and had been last seen in the custody of the testatrix, the law must presume that she had herself revoked it.

The Court cannot accede to either of these views. A material question of fact has to be decided in this case before any presumption arises on either side; and it is this—was the will found at the decease of the testatrix or not? If it was found at her death, and in an un mutilated state, then she did not revoke it. If it was not so found, then there is room and foundation for the revocation which the law will presume in the absence of testimony to rebut it. In most cases the solution of this question presents no difficulty. For the depositories of the deceased are duly searched by those whose good

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faith is not impugned, and who vouch for the fact one way or another. But in the present case it is far otherwise. A large body of evidence has been produced tending directly to question the fair dealing of the defendant, who had sole access to his sister's papers, and the charge of suppressing this will was but thinly veiled, though faintly pressed against him. Into the truth of this it is the duty of the Court with more firmness now to enter. It was proved that the will, when executed, was taken away by Miss Whatton. She had a large black box in her bedroom, of which she spoke to her landlady as containing valuable papers, and that this would be the depository of her will was highly probable. The evidence of Harriet Roberts converts this probability into certainty. Furthermore, Miss Whatton several times spoke of the will as existing after its execution. Once to Mr. Avison, the attorney and attesting witness, she said, "she thought she should make an alteration in her will, as she did not wish to leave her brother anything." This was in 1856. Hempson, the other attesting witness, says—"She several times spoke of the legacy to Mr. Pritt, that he had been one of her best friends, and that she hoped to reward him and would reward him." He added—"About six months before her death I met her. We went into the subject of Pritt's kindness, and she spoke of it again in the same terms, and of the unkindness of her brother." Mrs. Loosethwaite, who was her oldest friend, says—"She told me she had made a will; she said no more then. Once, almost ten months before her death, she was very ill. I asked her if she had settled her affairs; she said she had, and her mind was quite easy. She mentioned Mr. Pritt, and said she had left him a legacy." These several statements, all in one direction, spoken to by various and independent persons, and covering a considerable space of time reaching up to within six months of her death, which occurred on the 4th of September, 1859, lay firm ground for the supposition that the will had not been destroyed up to that period.

The period of her last illness and death brings with it evidence of a yet more cogent character. She was taken ill about Monday, the 28th of August. A Miss Greenwood, with whom she had some acquaintance, was kind enough to accede to her request that she should not be left quite alone, and passed the night in her house to relieve the nurse. "I asked if she had no friends; she said she had a brother, but she did not wish to see him; that he had been an ungrateful son and an unkind brother." And then the nurse was called, a woman with whom she had lodged on former occasions, and whom she seemed to regard with some favour. Her name was Roberts. She gave this account:—"That on the Tuesday or Wednesday before she died she asked the deceased if she should send for her brother. That the answer was, 'No, I don't want to see him.' She said she had made a document and preparation for her death. She said she had made it at Pritt's office. She said she wanted some alteration in the document, and she got out of bed and I helped her into a chair, and she unlocked the box and got out some papers up in her hand. She said she would like to see Mr. Avison. She then put the papers in and locked the box, and I got her into bed. When she had the papers in her hand she said she wanted an alteration in the document, to give more money to Mr. Podmore. She would not let me go to Avison." And then comes this remarkable statement:—"After that she was never out of her bed to the box;" "she could not get out without my help." Miss Greenwood certifies in the like direction, saying, "She became stupefied on Wednesday." These several statements form a consistent body of testimony, to which it is difficult to refuse a mature belief, that the will of this lady was in existence and in her box when she died a few days afterwards. Other evidence carries the case further. It appears that on Saturday before her death, she being then insensible, Miss Greenwood, under the advice of a medical man, took posses-

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sion of her keys. The next day she telegraphed for the defendant. He came, and the keys were handed to him. Both on the Sunday and on the Monday he had the box open for some time, and was searching, as he said, for a will. Mrs. Simister, the landlady of the house, deposes thus:—"He asked me if there was a will. I said I did not know. I told him I believed she kept all her private papers in a box, which I pointed out to him. It always stood there, and was always locked. I saw him afterwards looking at some papers. He had a piece in his hand. 'Well, Sir,' said I, 'have you found what you were looking for?' 'Yes, I have found something at last.' The paper was as large as a sheet of foolscap, and appeared clean." She was pressed as to the appearance of the paper more particularly, but without result. Harriet Roberts, the nurse, is very explicit to the same effect. She says—"On the Monday he was in the room with the box all day backwards and forwards. He held up a paper in his hand, and said, 'Here it is.' I don't know what he did with it. He said, 'They may all go to hell; I am her only brother, and no one has any right to the money but me.'" His subsequent conduct was pregnant with suspicion. He went to Mr. Avison to ask about his sister's property. Mr. Avison asked where she died. The answer was, "Somewhere in the suburbs of Liverpool." The question repeated only produced the same answer. Then Mr. Avison said there was a will. Defendant got annoyed and denied it. Avison showed him the draft, and he retreated from the office in a passion. He had taken the nurse Roberts with him to Avison's office, for what reason does not appear. On coming downstairs he said to her, that Avison had told him there was a will and money left to Pritt, to which he added, "And what do they want with it? No one has any right to the money but me." He afterwards volunteered to Roberts this suspicious statement, "The paper you saw was my grandfather's will;" and to Mrs. Simister, as late as last February, he volunteered a

similar statement. He came to her, told her she need not be afraid of speaking to him, and added, "The will you saw in my hands was my grandfather's will," and yet it was of this very paper that he had exclaimed at the time, "Yes, I have found something at last." This completes the history of the case.

As soon as the law permitted he made the usual affidavit that there were no testamentary papers found or come to his knowledge, and obtained letters of administration. Nobody was at hand to question his proceedings. Mr. Pritt had retired from business, and had seen nothing of Miss Whatton for years. He did not hear of her death till February, 1860, after the defendant had obtained letters of administration. His interest in the will was not large enough to induce him to embark in litigation. Mr. Podmore, the plaintiff, was in China. His letters to Miss Whatton had been returned marked "gone away," and he knew nothing of the matter till he returned to England in April, 1863. Some deduction must therefore be made from the probable accuracy of the witnesses, especially as regards conversations, owing to the lapse of time. But it must be borne in mind that the three women, Miss Greenwood, Mrs. Simister, and Harriet Roberts, were entirely disinterested in the matter. They have no interest to serve or end to compass, so far as the Court can perceive. In the very able address of Mr. Huddleston much pains was taken to discredit Harriet Roberts, and a comparison between her evidence and her affidavit certainly showed some striking discrepancies. But the Court can account for that without imputing to her an intention to deceive, and it is difficult to imagine that she could make a mistake about the leading facts she narrates. On the other hand, the defendant is called to deny that he ever saw a will of his sister's, and he repeats the story about his grandfather's will. But he does not deny the various expressions imputed to him.

All this evidence leaves a clear result on my mind. I am

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satisfied this will was in the box of the deceased when she died, and as the keys of that box were at once handed to the defendant, I am also clear that the will passed to his hands. Whether he destroyed it or whether he has it now, or where it is, or what has become of it,—these are needless questions; for if he, as spoliator, has suppressed it, I cannot doubt that the plaintiff is entitled to probate of the draft until the original will appears. It was strongly pressed at the trial that the Court should be cautious almost to timidity in basing its decision upon the ground of the defendant's guilt, and the door was held open to the safe refuge of "not proven." But it is well to bear in mind that there are two parties to the suit, and that undue tenderness to one is denial of justice to the other. And as the facts of the case have forced home on my mind the conclusion that this will came to the defendant's hands, I am bound to act on that conviction by pronouncing for the draft, and condemning him in this costs of the suit.

Dr. Spinks: The grant will be one of letters of administration with the will annexed, to which either the plaintiff or defendant as residuary legatee will be entitled. The Court will perhaps think it right to order that the grant be made to the plaintiff.

SIR J. P. WILDE: I think that is a proper order in the circumstances of the case.

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VELHO (by his Attorney) v. LEITE.

Will.—*Appointment of Executors in Portugal and in England.*
—*Probate.*—*Practice.*

L., who died domiciled in Portugal, made a Will, containing an appointment (substitutional) of four executors "in Portugal," and

another appointment (also substitutional) of four executors "in England." The plaintiff, who was named as an executor in both appointments, was resident in Portugal. The Court held, that the words "in Portugal" and "in England," were equivalent to "for Portugal" and "for England."

1864.
January 26.
VELHO
v.
LEITE.

Jose Pinto Leite, late of Oporto and Moorgate Street, London, died on the 21st of January, 1860, having made his will with a codicil, and thereof appointed executors "in Portugal," in manner following:—

"In the first place, J. P. Leite. In the second place, C. P. Leite. In the third place, A. F. Velho. In the fourth place, S. P. Leite."

He appointed executors "in England," in manner following:—

"In the first place, S. P. Leite. In the second place, M. P. Leite. In the third place, J. P. Leite. In the fourth place, A. F. Velho."

S. P. Leite and M. P. Leite had renounced probate, and a citation had issued, and been personally served on J. P. Leite, the executor in the third place in England, to accept or refuse probate, or show cause why probate should not be granted to A. F. Velho, the executor in the fourth place in England. To this citation no appearance had been entered.

The original will and codicil were in the possession of J. P. Leite, who resided at Oporto, but a notarial copy had been sent to this country, and an affidavit of a Doctor of Law of the Portuguese University of Coimbra had been filed, proving the due execution of the will and codicil according to the law of Portugal.

The Queen's Advocate (Sir R. J. Phillimore) moved that letters of administration with copies of the will and codicil annexed, limited until the original will and codicil should be brought into the Registry, should be granted to the attorney of A. F. Velho, the executor in England in the fourth place.

1864.
January 26.
VELHO
v.
LEITE.

SIR J. P. WILDE: The only question is, whether C. P. Leite, one of the executors "in Portugal," is entitled to probate as to the effects of the deceased in England. If he is, it would be requisite that he should renounce probate or be cited before the grant prayed could be made, for it is contrary to the practice of this Court to grant probate to the attorney of one executor reserving power to another executor. I think, however, that C. P. Leite is not entitled to probate in this country. The fact that the executor, on whose behalf the present application is made, who is appointed one of the executors "in England," is resident in Portugal, satisfies me that by the words "in England" and "in Portugal," in the appointment of the executors, the testator meant "for England" and "for Portugal" respectively. The motion therefore will be granted.

Motion granted.

January 26.

MARSH AND OTHERS v. CORRY.

MARSH AND
OTHERS
v.
CORY.

Declaration.—Pleading.—Particulars of Papers to be set up.
—Practice.

Where a Will or Codicil is propounded in a declaration in the usual form, and there is ground for suggesting that other testamentary papers, besides those specifically referred to in the declaration, may be included in the probate, the Court will order the party propounding the Will or Codicil to furnish the other party with particulars of the testamentary papers he intends to set up.

The plaintiffs, in a declaration in the usual form, propounded a will of Charlotte Gell, deceased, dated the 19th of January, 1860, and two codicils, dated respectively the 3rd of February, 1860, and the 19th of July, 1860.

The will contained the following clause :—" I give, devise, and bequeath all the rest, residue and remainder of my real and personal estate of every description unto the said Robert Marsh, William Edward Hilliard, and Charles Woodbridge, their executors and administrators, absolutely ; any further arrangement I may wish to make for the disposal of my property I shall express by writing in a book, which will be directed to the said Robert Marsh, William Edward Hilliard, and Charles Woodbridge, my three executors, trustees, and residuary legatees." Attached to the affidavit of scripts was a book marked (G), which had been found amongst the deceased's papers. It commenced thus :—" What may be disposed of by will or otherwise, to be sold by auction, and the assets to be invested by my residuary legatees. C. Gell, 29th June, 1859. . . . 1859. Donations not, I believe, in my will 1861. For Mr. Cochrane," etc.

1864.
January 26.
MARSH AND
OTHERS
v.
CORRY.

Mr. Raymond, on behalf of the defendant, moved the Court to order that the plaintiffs should declare or set forth whether or not, by their declaration, they propounded, as part of the will propounded by their declaration and as being entitled to be incorporated in it, a claim book or script (G) annexed to the affidavit of scripts.

Dr. Spinks, contra : The declaration sufficiently describes by dates the papers which the plaintiffs intended to propound. They are all dated in 1860. They could not propound script (G) ; for the entries in it are either dated before the date of the will, and cannot, therefore, be the book referred to in the will (which is clearly one the testatrix intended to write, and not one which she had written), or are dated subsequent to the date of the last codicil, and therefore could not be incorporated in it. The plaintiffs cannot at the hearing propound any papers not expressly propounded in the declaration.

1864. *Mr. Raymond* in reply : The plaintiffs handed to the defendant a copy of script (G). Why was that done if they did not intend to set it up ?

JANUARY 26.
MARSH AND
OTHERS

CORRY.

Dr. Spinks undertook that script (G) should not be set up at the hearing.

SIR J. P. WILDE : I think that the application is a reasonable one ; but after the undertaking of the plaintiff's counsel I shall make no order. I have inquired what was the practice of the Ecclesiastical Court, and I find that by the old practice, after the scripts were brought in the defendant was bound to say which of them he opposed, and the plaintiff then propounded in an allegation the scripts so opposed. In lieu of that practice, a declaration is now filed, which, in general terms, sets out the testamentary papers of the deceased. It seems to be a matter for consideration whether the practice should not be altered. In future, when necessary, I shall order the party propounding testamentary papers to furnish particulars as to the papers to which their declaration is intended to apply.

MARCH 1.

QUICK
v.
QUICK AND
ANOTHER.

QUICK v. QUICK AND ANOTHER.

Practice.—Mode of Trial.—Refusal of Jury.—Probate Act, sec. 35.

Where the cause, from the nature of the issues of facts raised, is a more proper one to be tried before the Court itself than by a jury, the Court will, on the application of one of the parties, direct it to be heard without a jury, unless such application is opposed by the heir-at-law.

The plaintiff propounded the contents of a lost will as uni-

versal legatee named therein. The defendants, amongst other things, pleaded:—(1) That plaintiff was not universal legatee. (2) Revocation. (3) That the contents were not those alleged. Issue joined.

1864.

March 1.

QUICK

v.

QUICK AND
ANOTHER.

Dr. Spinks, for the plaintiff, moved that the cause might be heard by the Court without a jury. For pleadings and facts, see *ante*, 442.

Mr. Searle, for the defendants, asked for a special jury.

SIR J. P. WILDE: Under the 35th section of 20 & 21 Vict. c. 77, I have a discretionary power to order these issues to be tried by a jury, but I am not bound to do so, and I think this is a case in which it would be better that the issues should be tried by the Court rather than by a jury.

Mr. Searle: The Court has certainly a discretionary power, but the practice hitherto has been to allow a jury upon the application of either of the parties.

SIR J. P. WILDE: The questions raised, in my opinion, require more cogency of proof than questions of fact ordinarily submitted to juries. Juries are sworn to find the questions submitted to them in the affirmative or negative, and they sometimes give their verdict upon a mere balance of evidence. I think this a case which ought to be tried by the Court rather than by a jury, and therefore, as I have a discretion, I shall refuse to order that the issues be tried by a jury.

1864.
March 15.
SMITH
v.
HOAD AND
OTHERS.

SMITH v. HOAD AND OTHERS.

Practice.—Mode of Trial.—Will.—Question of Presumptive Revocation.—Refusal of Jury.

Where the main question to be decided was presumptive revocation of a Will, the Court (the defendants who were not heirs-at-law opposing) directed the cause to be tried by the Court without a jury.

The defendants in their declaration alleged that Benjamin Smith, the deceased in the cause, made his last will, dated the 8th of August, 1846, and duly executed the same, etc. 2ndly. That on his death the will could not be found, and has not since been found. 3rdly. That the paper writing now remaining in the registry marked with the letter A, commencing, etc., and ending, etc., is a draft will, whence the said will was engrossed for execution, and contains the exact substance of the said will executed by the said testator.

The plaintiff pleaded—1st, That the will alleged to have been executed in the declaration was not executed according to the provisions of Vict. 1, cap. 26. 2ndly. That the said alleged will, howsoever executed, was destroyed by the said deceased in his lifetime with the intention of revoking the same. Issue joined.

Dr. Spinks, for the defendants, moved for the cause to be tried before the Court and a special jury.

Dr. Tristram, for the plaintiff, asked that it should be tried before the Court without a jury. The deceased had left considerable real property in Kent in gavelkind, and the plaintiff and his brother, for both of whom he appeared, were the sole heirs-at-law of the deceased, and were entitled to have a jury, but they did not wish to have one. The main issue raised, namely, what constituted the presumptive revocation of a

will, was more fitted to be submitted to a judge than a jury, and he therefore asked the Court, in the exercise of its discretion, so to direct the cause to be tried.

Dr. Spinks in reply.

SIR J. P. WILDE said, that the main question being one of mixed law and fact, would be more satisfactorily determined by a judge than a jury, and he therefore directed the cause to be tried before the Court without a jury.

1864.
March 15.
—
SMITH
v.
HOAD AND
OTHERS.

WILLIAMS v. HENRY AND OTHERS.

Postponement of Trial.—Absence of Witness.—Practice.

March 22.
—
WILLIAMS
v.
HENRY AND
OTHERS.

QUERE, whether a party who is entitled to have a trial postponed, in order that he may have an opportunity of cross-examining an adverse witness in Court instead of on commission.

The Court refused an application to postpone a trial from the Spring to the Summer Assizes, made on the ground that the plaintiff, a material witness on her own behalf (who was charged with having procured the execution of the Will she propounded by undue influence), and whom the defendant wished to cross-examine in Court instead of on commission, would be prevented by illness from being present at the trial, inasmuch as it was probable, from the medical testimony, that the witness would die before the Summer Assizes.

In this case the issues raised in a testamentary suit had been ordered to be tried at the Monmouthshire Spring Assizes.

Dr. Spinks, on behalf of the defendants, moved the Court to order that the trial should be postponed until the Summer

1864. Assizes, on the ground that the plaintiff, who it was believed
March 22. would be a material witness on her own behalf, she being
WILLIAMS charged in the pleas with having procured the execution of
v. the will propounded by undue influence, was dangerously ill,
HENRY AND and would probably not be able to be present at the trial at
OTHERS. the Spring Assizes, and the defendants would thereby be prevented from cross-examining her in open Court. A cross-examination on commission would not be satisfactory to the defendants, as the jury would not have an opportunity of judging of the credibility of the plaintiff's evidence by her demeanour.

Dr. Swabey, contra: There is no precedent for such an application. No good can result from the postponement of the trial, as the witness is in such a state of health that there is little likelihood of her being present at the summer assizes.

SIR J. P. WILDE: There can be no doubt that the examination of a witness out of Court is not so satisfactory as an examination in open Court. The effect produced upon the minds of the jury by reading to them the depositions of a witness is undoubtedly not so cogent as *vivâ voce* evidence. If I saw that before the Summer Assizes the inconvenience was likely to be removed, I might be disposed to grant the motion; but it appears from the affidavits that the witness is likely to die, and I shall therefore decline to interfere. A trial may generally be postponed upon the ground of the unavoidable absence of a material witness, whom the party applying for the postponement intends to call; but this is the first time I have heard of an application for such a postponement on the ground that the applicant expects that a material witness for the other side, whom he does not himself intend to call, will be unavoidably absent at the trial. I must refuse the application.

1864.

March 22.

In the Goods of GEORGE BADENACH (deceased).

In the Goods of
GEORGE
BADENACH.*Renunciation by Executor after Intermeddling.—Renunciation invalid.—Record of it on Probate Cancelled.*

Where one of several executors, who after intermeddling in his testator's estate, executed a renunciation, and probate had been granted to his co-executors, the Court, on the application of renunciant, declared his renunciation to be invalid, and directed the record of it on the probate to be cancelled.

George Badenach, late of Liverpool, Lancashire, fruit and provision broker, died at Liverpool on the 30th of September, 1863, having made a will dated the 14th of August, 1862, and thereof appointed his wife, Christina Miller Badenach, Frederick Robert Lawson, Joseph Woodall, and George William Bahr, executors and trustees. Messrs. Woodall and Bahr, on the death of the deceased, as two of his executors, appointed Mr. William Nisbett, of Liverpool, to attend at, and take charge of, the office and business of the deceased, and to look after the papers and property on the premises. They also took steps to employ an accountant to balance the testator's books, and gave directions for advertisements to be inserted in the newspapers as to the sale of the goodwill, the fixtures, and the premises; they also provided for the acceptances becoming due, and generally held themselves out as executors to persons attending on business at deceased's office. On the 16th of October, 1863, Joseph Woodall executed a renunciation of his right as well to the probate and execution of the will of the deceased, as to letters of administration with such will annexed, which renunciation was filed in the district probate registry at Liverpool; and on the 27th of October, 1863, probate of the will of George Badenach was granted to his widow, Christina Miller Badenach, power being reserved to make a like grant to Frederick Robert Lawson and George

1864. William Bahr. Subsequently a bill was filed in the Court of
 March 22. Chancery of the County Palatine of Lancaster, on behalf of
 In the Goods of Walter Thompson Badenach, an infant, by Hezekiah Hingley,
 GEORGE his next friend, as plaintiff, against all the executors of the
 BADENACH. will of George Badenach, for the administration of his estate.
 In this suit an order was made that Joseph Woodall and
 George William Bahr had accepted the trusts and executor-
 ship of the said will previous to the execution by Joseph
 Woodall of the renunciation, and that the real and personal
 estate of the deceased vested in the said Christina Miller
 Badenach, Joseph Woodall, and George William Bahr, as
 executors and trustees. Under these circumstances, Messrs.
 Joseph Woodall and George William Bahr wished to take
 probate.

Dr. Spinks now applied to the Court to declare the renun-
 ciation of the probate by Mr. Woodall to be invalid, he having
 intermeddled with the estate of deceased before he executed
 it. Under the old practice, the application would have been
 for leave to retract the renunciation, but by the statute 20 &
 21 Vict. c. 77, s. 79, an executor who has once renounced,
 can no longer retract such renunciation, and therefore it is
 necessary that the renunciation should be declared invalid.

3910115 SIR J. P. WILDE: I do not think that is the object of the
 clause. There is nothing in it to prevent the Court from
 allowing a retraction according to the old practice in a case
 fit for it. In this case the execution of the renunciation was
 altogether an invalid act.

Dr. Spinks: The act done was one Mr. Woodall was not
 competent to do, and it would seem to be the proper course
 to declare it invalid.

SIR J. P. WILDE: The ground upon which you rely is

sufficient to sustain the order applied for. The executor renounced on a statement that he had not intermeddled in the estate of the deceased. It now turns out that he had intermeddled, and, therefore, that he renounced at a time when he was not in a position to execute the renunciation. It was an invalid act. Under these circumstances I declare the renunciation invalid, and I give leave to Mr. Woodall to take probate of the will of the deceased. The record of such renunciation on the probate must be cancelled.

1864.

March 22.

In the Goods of
GEORGE
BADENACH.

FARRELL v. BROWNBILL.

Probate Act, sec. 73.—Grant to a Nominee of Parties interested.

April 19.

FARRELL
v.
BROWNBILL.

The Court will grant administration, with the consent of all the parties interested in the property of the deceased, to their nominee who takes no interest in the property himself.

Henry Brownbill, late of Regent Road, Salford, Lancashire, gentleman, deceased, died on the 3rd of November, 1861, a widower and intestate, leaving surviving him Caroline Farrell, wife of Patrick Farrell (the plaintiff), Thomas Frederick Brownbill, Henry Brownbill (the defendant), Ellen Brown, the wife of George Brown, Elizabeth Shields, the wife of Charles Boynton Shields, and Francis Crockwell, his natural and lawful children and next of kin, and the only parties entitled in distribution. On the 26th of December, 1861, administration of the property of the deceased was granted to Thomas Frederick Brownbill, one of the above-mentioned children, and he died on the 26th of March, 1863, leaving some of the property still undisposed of. On the 17th of April, 1863, Caroline Farrell applied to the district registry of the

Probate Act
2 Pa D 245

Lancashire
2 Pa D 361

1864.
April 19.

FARRELL
v.
BROWNBILL.

Court of Probate at Manchester for a grant of administration of the unadministered estate of the deceased, Henry Brownbill, but a *caveat* was entered against such a grant by her brother, Henry Brownbill. Thereupon Caroline Farrell and her husband filed a petition, and Henry Brownbill his answer, in which (amongst other things) he alleged that his three sisters, Mrs. Shields, Mrs. Brown, and Mrs. Crockwell, desired that the administration should be granted to him, Henry Brownbill, in preference to its being granted to Mrs. Farrell. Other pleadings followed, affidavits were filed on both sides, and the cause was about to be set down for hearing, when the parties came to an arrangement to stop litigation, and finally the consents of all the family were filed for the appointment of Mr. Henry Francis Paukhurst, of Manchester, auctioneer, as administrator of the unadministered estate of the deceased.

Mr. A. Stavely Hill now moved accordingly. The Court had power to make a grant to the nominee of the next of kin, under the 73rd section of the Probate Act, 1857. He understood that in an unreported case (*In the Goods of Joshua Holroyd, deceased*, April, 1858) a similar application had been granted.

Dr. Spinks, for other parties, consented to the grant being made.

SIR J. P. WILDE: As all the parties consent, I see no objection to the application.

LEAN v. VINER AND ANOTHER.

1864.

April 19.

LEAN
v.VINER AND
ANOTHER.

Service of Citation upon Minors.—Refusal of their Custodian to be present at Service.—Evasion of Service by Next of Kin.

Where a citation was served upon two minors at the house where they resided, but their custodian declined to be present at the service, and an attempt was also made to serve the citation on the next of kin of the minor, but failed by reason of the process-server not being permitted to see the next of kin, the Court held the service on the minors to be sufficient.

Robert Viner died on the 26th of August, 1853, having made his will, dated March the 9th, 1852, wherein he named his wife, Henrietta Viner, and Noah Crook, executrix and executor, and the said Henrietta Viner universal legatee. On the 4th of January, 1854, the said Henrietta Viner alone proved the will, power being reserved of granting probate to Noah Crook.

Mrs. Viner died on the 16th of July, 1857, intestate, and Noah Crook had subsequently renounced probate. Mrs. Viner left surviving her Anna Viner and Catherine Viner, spinsters, her only children and only next of kin, the only persons entitled in distribution to her personal estate and effects; but no letters of administration of such effects had been granted. The said Anna Viner and Catherine Viner were minors, and resided with a Mrs. Wilkie. H. E. Goodridge was their maternal uncle and one of their next of kin. George Stuckey Lean, a partner in Stuckey's Banking Company, and as such a creditor of the deceased, had extracted a citation calling upon the said Anna Viner and Catherine Viner to cause an appearance to be entered for them, and accept or refuse letters of administration with the will annexed of the unadministered estate and effects of the deceased, or to show cause why the same should not be granted to the said G. S. Lean.

1864.
April 19.

LEAN
v.
VINER AND
ANOTHER.

It appeared from the affidavit of Hayward, that he had personally served the minors with the citation at the residence of Mrs. Wilkie; that he had requested that Mrs. Wilkie might be present at the service, and that he had been informed by the minors that they had requested her to be present, but that she declined to be so present, stating that she was otherwise engaged. Hayward also stated in his affidavit, that he went to the residence of Dr. Goodridge, at Bath, where he was informed that H. E. Goodridge was staying, for the purpose of serving the citation; that, on asking for the latter, the servant said she would go and see if she could see him; that she went away and another servant came and asked for his name, and he told her he came from Messrs. Stuckey, the bankers. She went away, and shortly returned, saying, that Dr. Goodridge said that Mr. H. E. Goodridge must see no one, and that if Hayward went to 7, Henrietta Street, he would find some one there to attend to his business. Hayward afterwards went to 7, Henrietta Street, the office of Mr. A. Goodridge, another son of Mr. H. E. Goodridge, and requested him to give his father a copy of the citation, and that the latter would indorse on the citation an admission that he had received it, but Mr. A. Goodridge refused to do anything in the matter.

No appearance had been entered to the citation.

Dr. Wambey moved the Court to decree letters of administration, with the said will annexed, of the unadministered estate and effects of the deceased Robert Viner to be granted to the said George Stuckey Lean, as a creditor of the deceased. The only question is, whether there has been sufficient service of the citation. In strictness it should have been served upon the minors in the presence of Mrs. Wilkie, with whom they reside, and should also have been personally served upon their uncle Mr. H. E. Goodridge; but it appears from the affidavit, that the former had notice of the citation, but de-

clined to be present at its service, and it is reasonable to presume that Mr. Goodridge had notice. The grant, therefore, ought to be made.

SIR J. P. WILDE : I think you are entitled to the grant.
Motion granted.

1864.
April 19.

LEAN
v.
VINER AND
ANOTHER.

WILLIAMS v. HENERY AND OTHERS.

May 3.

Probate.—Costs of opposing Will.—Costs out of the Estate.

WILLIAMS
v.
HENERY AND
OTHERS.

The costs of an unsuccessful opposition of a Will allowed out of the estate, on the ground that the misconduct of those interested in setting up the Will had given reasonable ground for the litigation.

David Williams, late of Tredegar, died on the 30th of July, 1863. His widow, the plaintiff in this suit, propounded a will of the 1st of August, 1858, wherein she was named sole executrix and universal legatee. The defendants, who were next of kin of the deceased, pleaded—1. Not the will of the deceased. 2. Undue execution. 3. Incapacity. 4. Undue influence. The issues joined on these pleas were tried at the Monmouth spring assizes, 1864, before Baron Pigott, by a special jury. The jury found all the issues for the plaintiff.

Mr. Gray, Q.C., Dr. Tristram, and Mr. Dowdeswell, on behalf of the defendants, moved for a new trial, on the ground that the verdict was against the weight of the evidence, and, in the event of the new trial being refused, for an order that the defendants' costs should be paid out of the estate.

The Solicitor-General (Sir R. P. Collier) and *Mr. H. James*, for the plaintiff, asked the Court to pronounce for the will, and condemn the defendants in costs.

1864. SIR J. P. WILDE said that before deciding the question he
May 3. should consult Mr. Baron Pigott. *Cur. adv. vult.*

WILLIAMS
v.
HENERY AND
OTHERS.

SIR J. P. WILDE: This case was tried before Mr. Baron Pigott, at Monmouth assizes, and the will was established. Application was made for a new trial, on the ground that the verdict was against the evidence. Application was also made on the part of the defendants, that their costs should be paid out of the estate. I have consulted the learned judge, and I am satisfied that the will was properly established. There will therefore be no rule for a new trial. As to costs out of the estate, I am satisfied that the defendants had reasonable ground for the litigation. Within three or four days after the making of the will, the testator was, no doubt, in a state of insanity, which did not, however, continue. That fact alone, seeing that he afterwards, within six weeks or two months, was confined in a lunatic asylum, where he remained till the day of his death, was almost sufficient to lead people to doubt how soon the signs of insanity showed themselves, and how far, at the time of the making of the will, he was of sound mind. There is evidence, therefore, in this case to make it a fair question for litigation. The defendants, therefore, ought not to be condemned in costs. Before costs out of the estate can be granted, it is necessary to go further. By the rule which I have laid down for my own guidance, it is necessary to show, supposing the testator had in no way justified the litigation by his own act, some misconduct on the part of those out of whose pockets costs would come if paid out of the estate. In this case there is improper conduct on the part of the widow, and those acting with her, to justify me in making the order. It appeared that her trustee, Dr. Coates, a medical man, who drew and witnessed the will, had been acting with her after the testator had become subject to fits of insanity, with the view of obtaining a deed, the effect of which would be to vest all the testator's property in her.

This was in September, in which month he had been more than once in a strait waistcoat, which fact they did not communicate to the solicitor whom they instructed to prepare the deed. The defendants were, therefore, very naturally led to suspect the fairness of the conduct of the widow and of Coates, and were induced to litigate the will. Their costs, therefore, will be paid out of the estate.

1864.

May 3.

WILLIAMS
v.
HENRY AND
OTHERS.

In the Goods of JOHN BREWIS (deceased).

May 3.

Will.—Probate.—Incorporation.—Identification.

In the Goods of
JOHN BREWIS.

An unexecuted paper writing is not entitled to probate as incorporated, unless it be so described as to leave no doubt in the mind of the Court, on the circumstances proved, that it is the paper writing referred to.

The testator executed a Will on the first side of a sheet of paper, leaving his property after his wife's death to be divided in manner hereinafter named, amongst his nine children. On the second and third sides of the sheet there was a list of absolute devises and bequests to his children, not signed by the testator. The writer of the Will and of the list deposed that the list was written by him at the dictation of the deceased, and read over to him before the execution of the Will, but the attesting witnesses only saw the first side.

Held, that the intrinsic and parol evidence before the Court was not sufficient to justify it in granting probate of this list on motion.

John Brewis, late of Dunnington, Northumberland, shoemaker, deceased, died on the 30th of August, 1862. He made a will, dated the 1st of July, 1861, and thereof appointed Joseph Brewis, his brother, and John Brewis, his son, executors. By this will he gave to his wife all his property for life, "to be divided at her decease in the manner hereinafter named," amongst his nine children. This will was written and executed on the first side of a sheet of paper. At the top of the second

1864. side commenced the following paragraphs :—" 1. I bequeath to
May 3. " my daughter, Elizabeth Crompton, the sum of £5. 2. I be-

In the Goods of " queath to my second daughter, Mary Brewis, £27. 3. To
JOHN BREWIS. " my eldest son, John Brewis, a freehold dwelling-house, etc.;
" and I leave and bequeath to my aforesaid son John, all my
" stock-in-trade and book-debts in the shoemaking business."
The three following paragraphs made bequests to other children in the same absolute way. This part of the will was not signed by the deceased or executed. George Simpson and John Short, the attesting witnesses to the will, stated that they never saw anything but the first side of the sheet. Joseph Brewis, the brother, deposed that he wrote the will and the paragraphs which follow it, in the form and manner in which they now appear, previously to the execution of the will, and according to the instructions of the deceased; and that after the same had been so written, the will, with the addition, was read over by him to the testator, and that the testator approved thereof; that the testator fully meant and intended the said addition to form part of the said will, and that by the words " hereinafter named," the said testator meant and intended to refer to the said addition, and believed that he had referred thereto.

Dr. Tristram moved for probate of the will and of the list on the second and third pages. The list is incorporated in the will. Upon the face of the will, and without having recourse to parol evidence, it sufficiently appears that the list is referred to by the words " in manner hereinafter named among " my nine children." At all events the parol evidence of the brother of the deceased, which the Court is entitled to take into consideration, shows that the testator referred to that list. (He cited *Allen v. Maddock*, 11 Moo. P. C. C. 444; *Van Straubenzee v. Monck*, ante, p. 6.)

SIR J. P. WILDE : I must refuse to grant probate on motion

to the devises and bequests written on the second and third sides of the sheet of paper. The will itself is properly attested and executed. By it the testator leaves everything to his wife for life; then follow the words "to be divided at her decease in the manner hereinafter named, among my nine children to and for their own use and benefit absolutely;" but on the face of the will the manner is not afterwards mentioned. By the parol evidence, it appears that the will was executed in the presence of two witnesses, who did not see the second and third sides of the sheet of paper. Joseph Brewis deposes that he wrote the will and the list of devises and bequests, and he says that the various devises and bequests were written at his brother's desire; and that he read the list over to the testator before the will was executed. Still there is no definite reference in the will to the writing on the second and third pages, because the words in the will are, that the property shall be divided at the death of the wife. If the testator so intended, the bequests on the second and third pages do not carry out his intention. Before the Court could decide that this list is entitled to probate, it is necessary to use the words of the judgment in *Allen v. Maddock*, "that it should be so described as "to leave no doubt in the mind of the Judge, on the circumstances as they actually existed and are proved before him, "that the paper referred to is the paper propounded." I have great doubts whether this list of devises and bequests is the list referred to. This list imports that the list of devises and bequests are to take effect immediately; from the intrinsic evidence, therefore, they do not correspond with those alluded to in the will, and the testimony of the witnesses does not alter the matter. Neither the intrinsic nor parol evidence would justify me in granting this application on motion.

1864.

May 3.

In the Goods of
JOHN BREWIS.

1864.

May 31.

In the Goods of CHARLES TURNER.

In the Goods of
CHARLES
TURNER.

Presumption of Death.

A. was not heard of from December, 1846. More than seven years afterwards, namely, in September, 1854, he would, if alive, have become entitled, by the death of a relative, to a share in her residuary personal estate. This share had, in his absence, been paid into the account of the Accountant-General of the Court of Chancery, who, it was stated, was prepared to pay it to A.'s administrator. A. had no other property in this country.

The Court declined to make a general grant of administration to A.'s brother, on the ground that A. must be presumed to have died before the death of his relative, but made a grant limited to substantiate proceedings in the Court of Chancery.

Charles Turner, the supposed deceased, who was born in the year 1805, left his home at an early age, and for a time served on board one of her Majesty's ships of war. He was the son of Robert Turner, of Aston-on-Trent, Derbyshire. On the 21st of June, 1847, a letter from Charles Turner reached his father, dated "U. S. S. 'Princeton,' off Tampico, "8th of December, 1847, and posted as a ship letter at Liverpool on the 21st of June, 1847." No further information was ever obtained of or from him. At the time he was last heard from, besides the father, he had one brother, Robert Turner, his only near relatives. The father died on the 11th of February, 1850, a widower and intestate, and Robert Turner, the son, took administration of his estate. Mary Turner, formerly of Sawbridgeworth, Herefordshire, widow, died on the 26th of September, 1854, having, by her will, bearing date the 11th of September, 1850, bequeathed the general residue of her property to her sister, Ruth Hartley, who died in her lifetime. Such residue then became divisible among the next of kin of Mary Turner and the children of Matilda Turner, of whom Charles Turner was one, were entitled to one-fourth part thereof. The executors of the will of Mary

Turner paid one-eighth of the residue to Robert Turner, and another eighth, amounting to £412. 10s., into the account of the Accountant-General of the Court of Chancery in the absence of Charles Turner, and it still continued under the control of the Court of Chancery. There was no other property in England belonging to Charles Turner. The usual advertisements having been inserted, and other steps taken, for the discovery of Charles Turner,—

1864.

May 31.

In the Goods of
CHARLES
TURNER.

Mr. Inderwick moved for administration of his estate to be granted to his brother, Robert Turner, on the supposition that Charles Turner had died in or since the year 1846.

SIR J. P. WILDE called counsel's attention to the case of *Doe v. Nepean* (5 B. & Ad. 86), from which it appears that a man's death is presumed after an unexplained absence of seven years. Charles Turner must be taken, therefore, to have died before the year 1854, and he never had any property to found the jurisdiction of this Court.

Mr. Inderwick contended that although the Court might, it was not necessary that it should, presume that Charles Turner died before 1854. The Court of Chancery would not pay the money except to a representative of Charles Turner. No one was interested in the fund, in any case, besides Robert Turner.

SIR J. P. WILDE stated, that in this case the only grant he could make was one limited *ad litem* to appear and substantiate proceedings in the Court of Chancery. It will be for that Court to decide whether Robert Turner was entitled to any part of the fund standing in the name of the Accountant-General, and if so in what character.

1864.

June 7.

In the Goods of
Lowe.

In the Goods of DANIEL LOWE (deceased).

*Will.—Construction.—Sole Executrix.—Revocation by In-
ference.*

Where the testator in his Will appointed W. L. and W. B. executors, and in a codicil to the Will named his wife "sole executrix of this "my Will," the Court held, that the appointment in the Will of W. L. and W. B. as executors was revoked.

Daniel Lowe, late of Manchester, deceased, died, leaving a will and codicil. The will, which was dated April the 18th, 1860, contained the following clause:—"I appoint the said "William Lowe and William Bell executors of this my will." The codicil, dated April 18th, 1864, revoked a clause of forfeiture in the event of his wife's marriage, and contained the following clause:—"I appoint my said wife sole executrix of "this my said will, and in all other respects I confirm my said "will." The widow of the testator applied to the Registrar of the Court of Probate at Manchester, for a grant of probate to her as sole executrix, which he refused to grant unless the executors appointed by the will renounced. This the executors declined to do.

Dr. Tristram moved the Court to decree that probate of the will and codicil of the testator be granted to the widow of the testator as sole executrix. The appointment in the codicil of the testator's widow to be "sole executrix" is tantamount to a revocation of the appointment of the executors named in the will, the words "sole executrix" clearly implying an intention that no person should be associated with the widow in the office of executor.

SIR J. P. WILDE: The Registrars are always very properly reluctant to take upon themselves to exclude from the probate

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executors whose appointment is revoked only by inference. 1864.
 I think, however, here I cannot give effect to the word "*sole*" June 7.
 when the testator says in the codicil, "I appoint my wife *sole* In the Goods of
 executrix of my said will," without excluding the executors Lowe.
 appointed in the will. Probate may therefore go to the
 widow, as prayed. *Motion granted.*

RAWLINSON v. BURNELL AND OTHERS.

June 7.

Practice.—Administration to Creditor.—Affidavit of Date of Debt.

RAWLINSON
 v.
 BURNELL AND
 OTHERS.

The Court will not grant administration to a creditor without an affidavit of the date when the debt became due.

Mr. W. Whittaker Barry moved for a grant of administration to the plaintiff as a creditor.

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SIR J. P. WILDE: It does not appear on affidavit when the debt was incurred. According to the practice of the Court that is necessary, in order that it may be seen that the debt is not barred by the Statute of Limitations.

HERBERT v. SHEILL AND OTHERS.

May 26 and
 June 14.

Married Woman.—Undue Service of Citation.—Subsequent Renunciation.—Sureties resident in Scotland.—Case In the Goods of Ballingall.

HERBERT
 v.
 SHEILL AND
 OTHERS.

Where a citation has not been duly served on a married woman, the Court will act upon a renunciation subsequently executed by herself and husband.

1864.
May 26 and
June 14.

HERBERT
v.
SHEILL AND
OTHERS.

The Court will not accept residents in Scotland as sureties.

The case, *In the Goods of Ballingall* (*ante*, p. 441, note), overruled.

Thomas Sheill died on the 1st of April, 1864, intestate, a bachelor, without parent, leaving Robert Sheill, Margaret Herbert, wife of Robert Herbert, Mary Rutherford, wife of Robert Rutherford, his natural and lawful brother and sisters by the whole blood, and John Sheill and Elizabeth Herbert, widow, his natural and lawful brother and sister by the half blood, his only next of kin.

Robert Herbert, a nephew of the deceased, and one of the persons entitled in distribution, had cited the brothers and sisters of the deceased to accept or refuse letters of administration, or show cause why the same should not be granted to him.

The citation was served upon all the defendants, but Margaret Herbert and Mary Rutherford had not been served in the presence of their respective husbands. No appearance had been entered.

Mr. G. H. Cooper moved the Court to decree letters of administration of the effects of the deceased should be granted to Robert Herbert.

[SIR J. P. WILDE: Two of the defendants are married women, and the affidavits of service do not state that they were cited in the presence of their husbands.]

There is a renunciation executed by those two defendants and also by their husbands.

SIR J. P. WILDE: I think that will remove the difficulty. There is a misnomer of one of the defendants in the affidavit. Upon that being set right, the grant may go as prayed.

An affidavit of Robert Herbert was afterwards filed, from

which it appeared that the deceased's personal estate was sworn under £3000. That the deceased was a native of Scotland, and came to reside in England about nine years ago. That the said Robert Herbert was also a native of Scotland, and came to reside in England about the same time, and that during such period he had not had an opportunity of becoming acquainted with a sufficient number of persons in England to warrant him in requesting any two of them to become sureties for him in so large an amount, but he would be able to do so if the Court should divide the responsibility amongst the sureties by ordering four or any greater number to enter into the administration bond instead of two, and by also ordering that persons residing in Scotland should be included in such sureties.

1864.
May 26 and
June 14.
—
HERBERT
v.
SKILL AND
OTHERS.

Mr. G. H. Cooper moved the Court to direct that four or five sureties, instead of two, might execute the administration bond, and further that such sureties might be persons resident in Scotland. The Court had repeatedly limited the liability in the manner asked, under sec. 82 of the Probate Act. *In the Goods of Ballingall, ante, p. 444 (note)*, it had accepted sureties under similar circumstances resident in Scotland. But this had been stated *In the Goods of Thomas Reed, ante, p. 439*, to have been done *per incuriam*, on the suggestion that a writ of summons might be served on persons resident in Scotland, under the Common Law Procedure Act, 15 & 16 Vict. c. 76, sec. 18.

SIR J. P. WILDE: I will direct that four or five sureties may enter into the bond, but as the only authority for allowing sureties resident in Scotland is the case cited, and that would seem to be founded on an erroneous view of the Common Law Procedure Act, 1852, I must reject that part of the motion.

1864

May 10,
June 7 and 21.

In the Goods of ELEANOR WEBB (deceased).

In the Goods of
ELEANOR
WEBB.*Will.—Married Woman.—Testamentary Paper in Form of a
Deed of Gift.—Practice.*

A married woman, having a power to appoint by Will under her marriage settlement, executed on the same day two instruments, the first purporting to be a deed of gift to her sister of all her property, the second, after reciting the contents of the first, expressing a wish that her sister should pay certain bequests out of the property. These two papers were handed by the deceased after their execution, enclosed in an envelope, to the sister in whose custody they remained till her death. It was shown that the deceased had afterwards spoken of these papers as constituting her Will, and that the property referred to in them had remained under her control up to her death.

Held, that the papers were testamentary, and entitled to be proved.

Eleanor Webb, late of Under Dean Larches Awre, Gloucestershire, died the 11th of December, 1863, a widow, having survived her husband, John Webb, who died on the 26th of April, 1862. By the settlement made on her marriage, dated the 5th of December, 1842, certain property settled upon her was directed to be held in trust, in case she survived her husband, for her executors or administrators; but in case she died in his lifetime, for such persons as she should by deed or will appoint; and in default of appointment, for such persons of her blood, living at her death, as would have been entitled under the statute if she had died unmarried and intestate. On the 22nd of September, 1849, she executed on separate papers the following documents, which were in the handwriting of Mrs. Edwards, her sister:—

“ This 22nd day of September, 1859, I made this (with
“ consent of my husband, Mr. John Webb) as a gift of all and
“ every portion of my property, of all moneys, with interest
“ due thereon, in the possession of the Forest of Dean Iron
“ Company, or of my husband, Mr. John Webb, or his exe-

"cutors, with all my silver plate, and all and everything I 1864.
 "have, to my beloved sister, Frances Edwards, to her sole use May 10,
 "from this day. In witness whereof I this day sign my June 7 and 21.
 "name, in the presence of the undersigned witnesses. In the Goods of
 "ELEANOR WEBB. ELEANOR WEBB.

"Witnesses—J. Webb,
 Hannah Rawlings.

"Dated September 22, 1859."

"Having made a deed of gift to my dear sister, Frances
 "Edwards, of all my property wherever placed, both of that
 "in the Forest of Dean Iron Company possession, and also
 "of my beloved husband and his executors, on this 22nd
 "September, 1859, I am sure I can depend upon her faith-
 "fully fulfilling my wishes in the following bequests:" [The
 testatrix then made numerous bequests and continued:] "I
 "feel full confidence in my sister's complying with the above
 "most sacredly. I include with my other property all my
 "jewellery, wardrobe, etc., which I have not otherwise dis-
 "posed of.

"ELEANOR WEBB.

"Witness—J. Webb,
 Hannah Rawlings.

"Dated the 22nd of September, 1859."

At the time these papers were executed, Mrs. Webb was
 possessed of the sum of £2600 or thereabouts, which was de-
 posited at interest, in her sole name, with the Forest of Dean
 Iron Company. Part of this sum was money subject to the
 trusts of the marriage settlement, and part the proceeds of a
 legacy paid to her under the will of Mrs. Elizabeth Joliffe.
 She was likewise entitled to a sum of £1700 or thereabouts,
 the proceeds of the conversion of a portion of the trust funds
 secured by her marriage settlement, which had been lent to
 her husband, John Webb, by the trustees. Mr. Webb paid
 interest for the same, and such interest was from to time
 added to the amount of her aforesaid investment with the

1864.
May 10,
June 7 and 21.

In the Goods of
ELEANOR
WEBB.

Forest of Dean Iron Company. After the death of Mr. Webb the sum of £1700 having been repaid, was also invested in the same way; so that at the death of Mrs. Webb £4500 or thereabouts, the greater portion of which represented the trust fund, remained in the possession of the Forest of Dean Iron Company, in the name of Mrs. Webb; and besides that, she was possessed of household goods, furniture, jewellery, and wearing apparel. The documents above set out were enclosed in an envelope, and delivered to Mrs. Edwards immediately after they were executed, and remained in her custody until after the death of Mrs. Webb. The deceased frequently told her sister that she thought the will should be written in a more formal manner; on one occasion the second paper was torn, but the deceased would not allow it to be destroyed until a more formal document was completed. Just previous to her death, which was somewhat sudden, Mrs. Webb again addressed her sister, saying, "When is this deed of gift to be reviewed? but I am sure it is all safe and right, and it does not matter." Mrs. Webb never re-executed or republished these documents after the death of her husband.

Dr. Swabey moved for administration, with the two papers annexed, to be granted to the sister as residuary legatee. The papers were clearly executed with a testamentary intention; and the husband had so dealt with the property of his wife as to recognize her right to dispose of it as a feme sole. All her property would, therefore, pass under the will. [He cited on this last point *Haddon v. Fladgate*, 1 Swab. & Trist. 48; *Fettiplace v. Gorges*, 1 Vcs. jun. 46; and *In the Goods of Rebecca Smith, Widow, deceased*, 1 Swab. & Trist. 125.]

SIR J. P. WILDE declined to dispose of the case without further information.

Mrs. Edwards then made an additional affidavit, in which,

amongst other things, she stated, that although the first of the two documents was in the form of a deed of gift, it was not intended by the said deceased or herself (the writer) that the same should operate or take effect as an immediate disposition of her property, or until after Mrs. Webb's death; and that the second document was prepared and executed as an addition to the first paper, and contained the deceased's wishes as to the disposal of her property after her death, and it was not intended to operate or take effect otherwise than as her last will and testament in conjunction with the first. That notwithstanding the execution of these paper writings, none of the property of the deceased did, in fact, pass, or was considered to pass, to the deponent, or to either of the other persons named in the papers, but the whole of the property remained in the possession of Mrs. Webb until her death, and that Mrs. Webb had no intention of divesting herself of her property, or of any portion thereof, in her lifetime.

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May 10,
June 7 and 21.

In the Goods of
ELEANOR
WEBB.

SIR J. P. WILDE: I am satisfied that the two papers executed by the deceased are testamentary. It is clear that over a large portion of the property disposed of in these papers, the deceased had a disposing power, but it is unnecessary for me to decide what property passes under them, for Mrs. Edwards is next of kin as well as residuary legatee; and in that joint character I can make a general grant to her of administration, with the two papers annexed, as together containing the will of the deceased.

June 21.

In the Goods of ANN DURRANT HARRIS, Widow (deceased).

June 14.

Will.—Revocation.—Cutting Codicil.

In the Goods of
ANN DURRANT
HARRIS.

H. duly executed a Will, appointing executors, on six sheets, by sign-

1864.

June 14.

In the Goods of
ANN DURRANT
HARRIS.

ing her name at the end of each of the first five sheets, and at the foot of the Will on the sixth sheet. The testimonium clause stated that she had so executed the Will. H. afterwards executed a codicil, which was written at the back of the last sheet of the Will, containing an appointment of executors. H. subsequently cut off her signatures at the end of each of the first five sheets, and drew her pen through her signature at the foot of the Will on sheet six. There was satisfactory evidence that she intended to revoke the Will but not the codicil.

HELD, that H. having cut off a portion of the Will, which, though not in fact, was treated by her as a material part of it, had done an act of revocation sufficient to satisfy sec. 20 of 1 Vict. c. 26.

Probate granted of the codicil alone.

Ann Durrant Harris, widow, formerly of Winchester Place, Southwark, but late of Upper Montague Street, Russell Square, died on the 10th of September, 1863, having duly executed a will, dated the 2nd of April, 1839, and a codicil, dated the 19th of November, 1844. By the will she disposed of £500 in legacies, divided her plate and furniture amongst her children, and gave one-fourth of the residue to her daughter, Sarah Rew Roberts, and the remainder to be divided between her four sons. She appointed as executors her son John Quincey Harris, Joseph Quincey, Durrant Quincey, and John Rew, but expressed a wish that only the three last should act in carrying out the trusts of her late husband's will, of which she was sole executrix. By the codicil she gave all her furniture to the daughter, Mrs. Roberts, and revoked the appointment of the executors, John Quincey Harris, Joseph Quincey, and Durrant Quincey, but appointed the two last, together with her son-in-law, Philip Roberts. The will concluded as follows:—"In witness where-
" of I, the said Ann Durrant Harris, have to each sheet of
" this my last will and testament, which is contained in six
" sheets of paper, set and subscribed my hand, this 2nd day
" of April, 1839." It was proved that the deceased had executed her will in the way stated in this clause, but on her

death it was found that the signatures had been cut off the first five sheets of the will (without any word or letter of the contents of the will having been injured), and a pen drawn through the name at the end, and the following words in the handwriting of the deceased added:—"Cancelled, A. D. H., "15th December, 1857." The codicil was written on the last sheet of the will, and a portion of it covered the back of the paper on which the deceased had signed her name to the will. Mrs. Roberts in her affidavit stated that her mother was seriously ill in the latter part of the year 1857, from an affection of the heart; that she (Mrs. Roberts) having been informed that her mother's will, as it stood, if carried out, would seriously affect her brother's interest, took an opportunity, when her mother was sufficiently well, to mention and explain the matter to her; that her mother at once agreed it would be advisable to cancel the will. She was then propped up in bed, and at her mother's request the deponent took the will from the drawers in the bedroom, and gave it to her mother; that her mother then, in her presence, cut off the signatures at the bottom of the five first sheets, and also drew the pen through her signature at the bottom of the will on the sixth sheet thereof, and wrote the words, initials, and figures thereunder, as they now appear. The deponent subsequently told her mother that the cancellation of the will in the mode adopted would not affect the codicil; and her mother remarked that she was glad that the codicil might stand. At her mother's request the deponent afterwards wrapped up the will and codicil in a piece of paper, and replaced them in the drawer.

1864.

June 14.

In the Goods of
ANN DURRANT
HARRIS.

Dr. Middleton moved the Court to decree probate of the codicil alone to the surviving executors therein named, Durrant Quincey and Philip Roberts. The testatrix, by cutting off her signatures on the first five sheets, had destroyed the entirety of the will (*Williams v. Tyley*, 1 Johns. 530, 5 Jur.

1864. N. s. 35; *Price v. Powell*, 3 Hurl. and Norm. 341); and she
June 14. had so done, with an intention to revoke the will, and to pre-
serve the codicil.

In the Goods of
ANN DURRANT
HARRIS.

SIR J. P. WILDE: I am of opinion in this case, that probate should be granted of the codicil alone. The testatrix, having executed her will, by signing her name at the foot of each sheet, cut off the signatures on the first five sheets, and cancelled her own signature at the end on the last sheet, writing underneath that she had cancelled the will on a certain day. There can be no doubt that she did this act *animo cancellandi*, and it is also clear that she injured and partly destroyed the will itself. When the Court therefore has arrived so far as this, that there has been a certain act done with an intention to revoke, I ought not to strain the statute to render that act void. In *Price v. Powell*, the Court of Exchequer guarded itself against being supposed to lay down a general rule. Neither will I do so; but I think I ought to adopt the act of the testatrix as an act of revocation, and in so doing I shall follow the authority of the cases cited. The circumstances in *Price v. Powell*, which was decided under the Wills Act, are not identical with the present; but the Court there held, that as the testator had torn off the seal, which he had treated as a material part of his will, the will was destroyed in its entirety. In this case the portion of the will destroyed was not such as was necessary by law to its existence, but in the last sentence of her will the testatrix refers to those signatures as giving validity to the will, and I shall therefore hold that the will was destroyed in its entirety, and that I can only decree probate of the codicil.

1864.

June 28.

In the Goods of ANDERSON (deceased).

*Administration.—Next of Kin and Widow.*In the Goods of
ANDERSON.

The Court will, on sufficient cause shown by the next of kin, on motion, exercise its discretionary power and grant administration to such next of kin in preference to the widow.

William Anderson died in the hospital at Quebec, on the 18th of October, 1862, without child or parent, and intestate. He was a mariner, and his sole personal property was a sum of £89. 2s. 8d., held by the Board of Trade, London, being the amount of wages due to him, and the proceeds of the sale of his personal effects. On the 9th of January, 1864, letters of administration of his personal estate were granted by the principal registry of Her Majesty's Court of Probate to Charles Anderson, as the natural and lawful brother and only next of kin of the said deceased, who was therein described as a bachelor. It appeared, however, that the deceased had been married to a woman whose Christian name was Charlotte, that they resided together in the parish of St. Thomas-in-the-East, in the island of Jamaica, and that in the year 1846 his said wife, when he was confined to his bed by illness, sold off his household furniture, and carried away his wearing apparel, and went to Bath in the same parish, and there committed adultery, and from that time the deceased had no communication with her. He left Jamaica in the year 1851, and went to sea as a mariner. His wife also afterwards left the island, and nothing had been heard of her since, and on that account the said Charles Anderson and her other acquaintances believed that she was dead. The said Charles Anderson inadvertently swore to the oath forwarded from England to enable him to obtain the aforesaid letters of administration, not observing that his brother was therein described as a bachelor. If the said Charlotte Anderson had died in the deceased's lifetime, the said Charles Anderson was

1864. the only person entitled to his personal estate and effects, but
 June 28. if she had survived the deceased he was equally entitled with
 In the Goods of her to the deceased's property.
 ANDERSON.

Dr. Wambey moved the Court to revoke the letters of administration granted to Charles Anderson on the 9th of January, 1864, and to grant to him fresh letters of administration. The grant of administration to the widow of an intestate is discretionary, and the next of kin may be preferred to her for sufficient cause. Thus the widow has been passed by on the grounds of lunacy (*In the Goods of Williams*, 3 Hagg. 217), and on the ground of her misconduct in eloping from her husband and cohabiting with other men during his lifetime. (*Fleming late Worsey v. Pelham*, 3 Hagg. 217, n.) The misconduct of the widow in this case is sufficient ground for passing her by if she is still living.

SIR J. P. WILDE: In the former of those cases, the Court said, "It has been always held that the widow upon good cause may be set aside." I think there is good cause for setting aside the widow in this case. The only difficulty I felt was, whether I ought to do so upon motion, but that case is an authority for my doing so. Letters of administration will therefore be granted to deceased's brother, but there must be justifying security.

June 28.

In the Goods of SARAH ROSSER (deceased).

In the Goods of
 SARAH
 ROSSER.

Renunciation and Consent.—Power of Attorney.

Where the party entitled to the grant, being resident out of England, had by a power of attorney specially authorized his brother to execute for him an instrument of renunciation and consent, the Court acted on a renunciation and consent so executed.

Sarah Rosser died in the city of Bristol in June, 1850, intestate, without child, leaving William Rosser, her lawful husband, now resident in the county of S. in Pennsylvania. The deceased was entitled at the time of her death to reversionary interest under her father's will, to come into possession on the death of her mother, which took place in October, 1858. A question had been raised on the construction of the will as to her right to this property, but an arrangement had been come to between the husband and Robert Newstead Osborne, the deceased's brother, by which the husband was to receive a sum from a brother in lieu of his claim, and was to consent to the brother taking out administration to her estate. William Rosser had accordingly executed a power of attorney whereby, after reciting that he had not intermeddled in her estate, that he was resident out of England, and that he was desirous that letters of administration of the personal estate of the deceased should be granted to the said Robert Newstead Osborne, he appointed James Rosser, of L. in the county of Glamorgan, "his attorney to execute any instrument for the purpose of renouncing on the part and behalf of the said William Rosser all right and title to the letters of administration of the personal estate and effects of the said Sarah Rosser, deceased, and of consenting to a grant of letters of administration of the estate and effects of the said decease being made to the said Robert Newstead Osborne, and also to sign and execute on behalf of the said William Rosser any other document required to obtain or perfect the grant of such letters of administration to the said Robert Newstead Osborne as aforesaid."

1864.

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In the Goods of
SARAH
ROSSER.

There was filed a certificate by J. S., a justice of the peace in the county of S. in Pennsylvania, of an acknowledgment before him by William Rosser, of the power of attorney; also a certificate by C. F., prothonotary of the Court of C. P. of the said county of S., that J. S. was an acting justice of the peace for the said county, and that his signature to the said

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In the Goods of
SARAH
ROSSER.

certificate was genuine, and a certificate of the British consul for Pennsylvania of the genuineness of C. F.'s signature to the second certificate, and of his being prothonotary of the Court of C. P.

Dr. Spinks moved for a grant of administration of the effects of the deceased to pass to Robert Newstead Osborne, on the renunciation and consent of her husband, executed under the aforesaid power of attorney. It was not the practice of the registry to accept a renunciation and consent made by a person acting under a power of an attorney from the person entitled to the grant.

SIR J. P. WILDE: The usual practice of the registry has been to require renunciations to be under the hand of the party entitled to the grant. In this case the party desirous of renouncing has, by a power of attorney, authorized his brother to renounce for him. Had the power of attorney been framed in general terms, the Court might have felt a difficulty in departing from the practice. But the terms of the power are so specific that I think the Court may safely accept a renunciation and consent executed by the brother.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

JEFFREYS v. JEFFREYS AND SMITH.

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Husband's Petition.—Separation from Wife without reasonable excuse.—31st sect. Divorce Act.

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The husband is bound to give the wife the security and comfort of his home and society so far as his position and business will admit, and if the Court is satisfied that the husband has failed in this duty it will, in the exercise of its discretion, refuse to dissolve the marriage by reason of the wife's adultery.

This was the husband's petition for dissolution of marriage. No appearance was given.

The petitioner's case was conducted by *Dr. Spinks*.

THE JUDGE ORDINARY expressed himself dissatisfied with the circumstances in which the husband separated from the wife; the petition was adjourned and the petitioner examined. The facts are sufficiently stated in the judgment.

Cur. adv. vult.

THE JUDGE ORDINARY: This case was heard before the

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Court without a jury and the adultery proved. But, as the petitioner appeared to have left his wife for some time previous, the Court naturally required an explanation of his conduct, and for that purpose availed itself of the powers granted by sect. 43 of the Act, to examine the petitioner himself.

It appeared on his statement that he was a butler in the service of a lady who was often away from London, and for a long time resident at Brighton. That he was, however, able to visit his wife frequently, and on many occasions to pass the night at his lodgings. In this way they cohabited together from 1844 to about the year 1854, when he left her altogether, but continued to provide for her support. About four years ago, according to his account, but much longer according to a statement by the wife, he discontinued this provision. From February 1853 to the end of 1854 the petitioner and his wife lived in a house in Carlisle Street, and the co-respondent Smith, a bricklayer, lodged in the same house with them. About the end of 1854, or early in 1855, the petitioner gave up this house, and upon his wife's removal to another house, Smith followed or accompanied her. It was this circumstance, according to the petitioner's statement, which first made him suspect any impropriety between them. And though it is not easy upon the evidence to assign any exact time to the first act of adultery, the subsequent conduct of the parties leads to the belief that his suspicions were well founded. But the petitioner had deserted his wife some time before. The petitioner's aunt, who was called on his behalf, said: "I have been in Carlisle Street before he left her. He did so considerably over a year before she left that place;" an event which, according to the same witness, occurred at the end of 1854 or spring of 1855.

The question then arises, whether at that time the petitioner had good cause for thus withdrawing himself from his wife's society, and thus exposing her to temptation, against which his presence and protection might have been a safe-

guard. He could state no reason himself except a suspicion of her chastity, which, as I have already said, did not arise till long afterwards. The other witness could only speak to some acts of familiarity which were not communicated to the petitioner, and (what is much more material) to which they could assign no date, showing them to be previous to the husband's desertion. Some letters, written by the petitioner, were also put in to show his conduct and motives; but though they contained expressions of disapprobation of his wife's conduct in other respects Smith was not mentioned, nor was adultery so much as pointed at. I am compelled to conclude that the wife's intimacy with Smith was not the true ground of the petitioner's withdrawal, and I am unable, from the evidence, to draw the inference that such intimacy really then existed.

This state of things is fatal to the petitioner's prayer for relief from this Court. If chastity be the duty of the wife, protection is no less that of the husband. The wife has a right to the comfort and support of the husband's society, the security of his home and name, and the first protection of his presence, so far as his position and avocations will admit. Whoever falls short in this regard, if not the author of his own misfortune, is not wholly blameless in the issue; and though he may not have justified his wife, he has so far compromised himself as to forfeit his claim for a divorce.

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(Before the Full Court—THE JUDGE ORDINARY, CHANNELL, B., and
KEATING, J.)

CODRINGTON v. CODRINGTON AND ANDERSON.

*Access to Children pending Suit.—Discretion of the Court.—
Guides thereof.*

On an application for an order for access to children pending suit on behalf of the mother, the Court will require to be satisfied that the motive is natural love and affection for the children, and that the applicant has no indirect object in view; as to which, lapse of time in making the application may be material. The Court will also consider the convenience of all parties in the circumstances, and how the children would probably be affected if the order were made.

In this case *Mr. Inderwick*, on behalf on the respondent, had moved the Judge Ordinary to make an order for Mrs. Codrington to have access to her children. The motion was founded on the following affidavits:—

Affidavit of Helen Jane Codrington, therespondent, sworn the 11th of April, 1864.

“I was on the 9th day of April, 1849, lawfully married to
“Henry John Codrington, a Vice-Admiral in Her Majesty’s
“Navy, the above-named petitioner, at the British embassy
“at Florence. I lived and cohabited with my said husband
“at divers places, and amongst others at Malta, at Eaton
“Square, and at Wilton Place, both in the county of Middle-
“sex, and there have been issue of my said marriage and co-
“habitation two children, to wit, Ann Jane Codrington, born
“on the 7th day of February, 1852, and Ellen Codrington,
“born on the 16th day of February, 1853. I have always
“had the entire care and nurture of the said Ann Jane and
“Ellen Codrington and have personally superintended their
“maintenance and education from their birth until the 5th day
“of November last, when they were removed as hereinafter

“ mentioned. On the 5th day of November last, while the
 “ said Ann Jane and Ellen Codrington were walking with
 “ Mrs. Lawless, their governess, they were forcibly taken
 “ from the said Mrs. Lawless, without my knowledge or con-
 “ sent, by the Rev. Joshua Rowley Watson and his wife,
 “ Emily Watson, for the alleged purpose of my said children
 “ meeting their father at the house of his cousin, Miss Bethell,
 “ 43, Upper Grosvenor Street. I received no notice or inti-
 “ mation, either from the said Henry John Codrington or
 “ from any person on his behalf, that the said Ann Jane and
 “ Ellen Codrington would be so removed from me as afore-
 “ said, and I have never since the said 5th day of November
 “ last seen the said Ann Jane and Ellen Codrington, or either
 “ of them. I was, on the 14th day of November last, served
 “ with the citation and copy of petition in this suit, wherein
 “ my said husband charges me with having committed adul-
 “ tery with Colonel David Anderson, the above-named co-re-
 “ spondent, and with other persons. I caused an appearance
 “ to be duly entered on my behalf on the 24th day of Novem-
 “ ber last, and on the 20th day of January last I also caused
 “ my answer to the said petition to be filed, denying that I
 “ had committed adultery as set forth in the said petition,
 “ and issue has been, as I am informed and verily believe,
 “ joined in my said answer and the suit set down for hearing.
 “ I am informed, and verily believe, that on or about the 20th
 “ day of November last, and since the institution of this suit,
 “ the said Henry John Codrington removed the said Ann
 “ Jane and Ellen Codrington out of England, and beyond the
 “ jurisdiction of this honourable Court, but where the said
 “ Ann Jane and Ellen Codrington now are, or in whose cus-
 “ tody they now are, I am unable to state, but I am informed,
 “ and verily believe, that they are under the control of the
 “ said Henry John Codrington. I have on several occasions
 “ applied through my solicitors, Messrs. Few and Co., to the
 “ said Henry John Codrington, through Mr. Bird, his so-

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" licitor in this suit, for permission to see and have access to
 " my said children, Ann Jane and Ellen Codrington, but have
 " been informed by the said Mr. H. P. Bird, and believe it to
 " be the fact, that the said Henry John Codrington will not
 " sanction the same. I have on several occasions, but not
 " since the said 2nd day of April instant, received letters from
 " my said children Ann Jane and Ellen Codrington. The
 " said letters were written in very affectionate language, and
 " in the first of such letters they expressed a wish that I
 " should be with them, but the said letters contained no ad-
 " dress, or any other information as to where or in whose cus-
 " tody my said children were, and I have no means of com-
 " municating with my said children, or of learning their ad-
 " dress. I am desirous that my said children Ann Jane and
 " Ellen Codrington may be re-delivered into my custody,
 " therein to remain until further order of this honourable
 " Court, or that I may be ordered to have access to my said
 " children, Anne Jane and Ellen Codrington, on the 29th day
 " of April instant, and three times in every succeeding week
 " until the final decree or other determination of this suit, at
 " my residence, No. 9, Cadogan Place, aforesaid, or at some
 " other convenient place within the jurisdiction of this honour-
 " able Court, without the interference or presence of any per-
 " son or persons, or that I may have access to my said chil-
 " dren at such other times, and subject to such regulations, as
 " to this honourable Court may seem just and proper."

Affidavit of Messrs. Few's clerk :—

" I have the management of the proceedings in this suit
 " on behalf of the respondent. On or about the 21st day
 " of March, 1864, the said Messrs. Few did write and send
 " to Mr. Bird, the solicitor for the petitioner in this suit, a
 " letter, of which the following is a true copy :—

" ' March, 1864.

" ' *Codrington v. Codrington.*

" ' Sir,—The knowledge of the existence of this suit being

“no longer restricted to the parties themselves, we have
 “Mrs. Codrington’s directions to take steps for obtaining
 “access to her children, who were removed from her charge
 “during a short absence from home on the morning of the
 “5th of November, by the Rev. Mr. Watson and Mrs. Wat-
 “son his wife, without the slightest notice to her, and who
 “have been since removed by the Admiral from England to
 “Gibraltar, where we understand they still are. Our former
 “application for the children having been made in Novem-
 “ber last, we deem it expedient to repeat the application to
 “you before giving notice for a motion to the foregoing
 “effect, and we have therefore allowed the motion-day of the
 “22nd instant to go by, in the hope that the Admiral may
 “agree to send for the children at once, and may authorize
 “you to arrange with us for an immediate compliance with
 “their mother’s earnest wishes. We beg to hear from you
 “in reply in the course of the ensuing week, as, in the event
 “of your client refusing Mrs. Codrington’s application, we
 “shall have no alternative but to give notice of a motion in
 “court for the ordinary access by that lady to her children.

“We are, Sir, your obedient servants,

“FEW AND CO.’

“That no reply has been received by the said Messrs. Few
 “and Co. from the said Mr. Bird to the said letter.”

Mr. Karlake, Q.C., and Dr. Spinks, contrà. They relied
 on the following affidavit:—

“I, Robert Cork, of 58, Lincoln’s Inn Fields, in the county
 “of Middlesex, managing clerk to Henry Peale Bird, of the
 “same, solicitor for the above-named petitioner, make oath
 “and say as follows:—On the same day, or the day after the
 “removal of Ann Jane and Ellen Codrington, the two chil-
 “dren of the petitioner and respondent, from 82, Eccleston
 “Square, the residence of the petitioner, I personally in-
 “formed the respondent the said children were in the country

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" with their father, the petitioner, and would continue so to remain, whereupon she informed me she had been advised she could insist upon having the custody of them, but would be content if I would, from time to time, remit to the children communications from her to them, and from them to her in reply, urging that, as the petitioner could first read her letters to the children before delivering them, and could also first read the children's replies to respondent, the petitioner could not object. To this proposition I at once consented, and accordingly, from time to time, remitted respondent's letters to the children, and the children's replies to the respondent. On the 20th day of November last the petitioner, for the purpose of preventing any annoyance to himself or children from the respondent, left England with the said two children, and proceeded to Gibraltar on a visit to his brother, General Sir William Codrington, Kt., the Governor of Gibraltar; and the said petitioner and his said two children have been from that time, and now are, resident at Gibraltar. I have been informed by the petitioner, and verily believe, that from the time of the removal of the said children from Eccleston Square, they have continued to remain and are now under the same roof with him, under and subject to his own personal superintendence and guidance. The day following the petitioner's leaving England I apprised the respondent thereof, and that he and the children were going to Gibraltar, to remain for some time the guests of Sir William Codrington. The petitioner and also the respondent has informed me that the respondent had communicated with the petitioner by post to Gibraltar, and also in like manner had from time to time communicated with the children and received from them replies thereto, and that respondent had also sent by steamer to Gibraltar various articles for the children. I have been informed, and verily believe, that the respondent has recently been wrongly informed that the petitioner was in England, and

“that in consequence of such information respondent proceeded to Hampton Court, the residence of Lady Bouchier, petitioner’s sister, and also to Windsor, the residence of Miss Maria Codrington, another sister of the petitioner, and that not being able to meet with the petitioner, respondent expressed her intention of going to Dawlish, near Exeter, the residence of the Rev. Joshua and Mrs. Watson, the persons mentioned in the fourth paragraph of respondent’s affidavit in this matter, sworn the 11th of April instant, for the like purpose, and I have subsequently been informed and believe, that in consequence of the said Joshua and Mrs. Watson being temporarily absent from Dawlish, that a solicitor at that place has been instructed by Messrs. Few, the respondent’s solicitors, to procure the address of the said Joshua and Mrs. Watson. The said Henry Peale Bird, petitioner’s solicitor, on the 27th March last, left England for Gibraltar, for the purpose of consulting with the said petitioner in this matter, and he has not returned to England.”

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THE JUDGE ORDINARY: I think in these circumstances the discretion of the Court ought to be exercised in favour of the husband. The children were taken possession of by him about the time the suit was commenced. If Mrs. Codrington had applied to this Court as soon as she appeared in this suit, the children might have been detained in this country by an order of the Court; failing that, she would have been in a different position if she had come to the Court as soon as she knew they were moved out of the country: they are now at Gibraltar with their father, and she has been contented for some months with the sort of arrangement which is spoken of in Mr. Cork’s affidavit. Substantially, I am now asked to order Admiral Codrington to bring or send the children to this country, and that I do not think I ought to do.

An appeal from the refusal of the Judge Ordinary was

1864. heard before the Full Court on the same materials as were
 April 28. before the Judge Ordinary on the 29th of April.

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 ANDERSON. *The Queen's Advocate* (Sir R. J. Phillimore) and *Mr. Inderwick*, for the appeal, tendered further affidavits in reply to that of Mr. Cork, which the Court refused to read.

Mr. Karslake, Q.C., and Dr. Spinks, contra.

CHANNELL, B. : This is an appeal against a decision of the Judge Ordinary, by which he refused to make an order in favour of Mrs. Codrington for the custody of, or, in the alternative, for access to her children. I quite agree that the Court has power to make an order for access only, and that the decision of the Judge Ordinary in such a matter may be properly reviewed by the full Court, but that must be on the same evidence as was before the Court below when it came to the decision appealed from. I do not deny either that the Court will act on the presumption of innocence, and will, as a general rule, give the wife access to the children pending suit. I assume no impropriety on the part of the wife ; but on the day or day after that on which the children were taken out of her custody, she had an interview with Mr. Cork, and made the sort of agreement with him, that is described in his affidavit. I do not stop to consider what the position of the wife might be, when somewhat of a fraudulent possession of the children has been obtained by the father. It is true her consent to the separation was at first on the supposition that the children were to be in England. Upon the 21st of November, she knew that they were gone to Gibraltar, and she continued to act on the former arrangement. The affidavits in support of the motion would, if unanswered, found a case for order for access ; but I think they are answered by Mr. Cork's affidavit, and considering that Mrs. Codrington delayed making any application from the 21st of November until the 11th of April, I think the Judge Ordinary exercised a sound discretion in refusing to make any order.

KEATING, J. : I think the Judge Ordinary was right. Mrs. Codrington had full notice that the children were removed to Gibraltar, and she continued to act on the arrangement for corresponding with them up to the present month. The Queen's Advocate seemed to argue on the assumption of a vested right in the mother, which lapse of time could not affect. I quite agree that, in dealing with these applications pending suit, the Court should be careful not to make any order, nor to say anything tending to prejudge the main question.

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THE JUDGE ORDINARY : I think the right of the wife to access to her children has been argued to exist in a much stronger degree than it really does. The word itself is not to be found in the 35th section of the Divorce Act, and the interpretation put upon the section in the case of *Thompson v. Thompson and Sturmfels* (2 Swab. & Tris. 402) must not be strained. The Court is to make such order "as it may deem just and proper." The obvious intention of the Legislature was to gratify the natural affection of both parties for the children. The convenience of both parties must be considered, and when the Court sees reason to believe that access to the children would be productive of injury to them, or where the Court thinks that the application is not *bonâ fide*, it ought to refuse it.

ELLYATT v. ELLYATT, TAYLOR, AND HALSE.

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April 13, and
May 3.

Inconsistent Verdict.—Connivance and Damages.—New Trial.—Costs.

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An inconsistent verdict is not necessarily a ground for a new trial. It would be so if it prevented the Court from ascertaining the substantial opinion of the jury.

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1864. Where the jury found adultery, connivance on behalf of the petitioner, and assessed damages against the co-respondent at £50, the Court refused to grant a rule nisi for a new trial, holding that there could be no doubt of the substantial meaning of the jury in their verdict of connivance, and that it was sufficiently founded on the evidence. The Court further—

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HELD, that the co-respondent was entitled to be dismissed from the suit, and made no order as to costs between the petitioner and such co-respondent.

The wife having established a good defence in law to her husband's petition, will be entitled to have her costs taxed against him, though she may have omitted to take the precaution of having a sum of money paid into Court, or security given to meet her costs of the hearing.

This was the husband's petition for dissolution of marriage. The petitioner claimed damages from both co-respondents.

The co-respondent Taylor did not appear. The respondent and the co-respondent Halse filed answers denying the charge of adultery, and pleading condonation, connivance, and that the petitioner was accessory to the adultery; also charging him with desertion, wilful separation without reasonable excuse, unreasonable delay, and adultery.

The issues joined on these pleas were tried before the Judge Ordinary, by a common jury, on the 9th and 10th of March, 1864. The jury found that the respondent had been guilty of adultery with both co-respondents, and assessed the damages against Taylor at £10, and against Halse at £50. They also found that the petitioner had connived at, and had been accessory to, the respondent's adultery. They found that there had been a separation by mutual consent; but said that they had not made up their minds whether or not there was reasonable excuse for such separation.

THE JUDGE ORDINARY said, he should not press the jury for a verdict upon the issue of wilful separation without reasonable excuse, as that was a question for the Court, and took time to consider what decree ought to be pronounced.

On the 19th of April,

Mr. Sleigh (*Mr. F. H. Lewis* with him) moved the Court to dismiss the co-respondent Halse from the suit, with costs. The position of a co-respondent against whom damages are claimed, is analogous to that of a defendant in the abolished action for crim. con. The consent of a husband to his wife's infidelity was a bar to such an action (*Duberley v. Gunning*, 4 T. R. 661). The jury having found connivance, Halse is entitled to be dismissed from the suit, and with costs. It may be a question whether he has any right to ask the Court to dismiss the petition under sect. 30 of 20 & 21 Vict. c. 86.

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Dr. Swabey and *Mr. Starling* were for the respondent.

Mr. Serjeant Ballantine, and *Mr. Clare*, for the petitioner, opposed the motion, and also moved for a new trial, on the grounds, first, that the verdict upon the issue of connivance was against the evidence; secondly, that the verdict was inconsistent, the jury having given substantial damages to the petitioner, whom they also found to have been guilty of connivance. The natural inference, from the inconsistency of the verdict, is, that the jury could not have understood the meaning of the term "connivance." (They cited *Allen v. Allen and D'Arcy*, 2 Swab. & Tris. 107; *Marris v. Marris and Burke*, 2 Swab. & Tris. 530; *Sugg v. Sugg and Moore*, 31 L. J. (N. S.), 41 Pr. M. & A.; *Rogers v. Rogers*, 3 Hagg. 57; *Moorsom v. Moorsom*, ib. 96; *Stone v. Stone*, 1 Rob. 99; *Phillips v. Phillips*, ib. 156.)

THE JUDGE ORDINARY: I think that there ought to be no rule for a new trial. The jury have found a verdict, which is certainly not strictly consistent. Such an occurrence is not uncommon, and it often happens that the inconsistency of the verdict is such that the Court cannot see clearly what was the substantial opinion of the jury; the inconsistency being such as to obscure the whole decision of the jury. In such a case,

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the only remedy is to submit the case to another jury. It does not, however, follow as a necessary consequence, because the finding of a jury is inconsistent, that their substantial opinion cannot be ascertained.

In this case, notwithstanding the inconsistency of the verdict, I can see no difficulty in coming to the conclusion that the jury thoroughly understood the meaning of the term "connivance," and did intend to find that the petitioner had connived at his wife's adultery. It is true that they follow up that verdict by assessing substantial damages against the co-respondents; but that assessment does not, to my mind, raise any difficulty in ascertaining their opinion, as it may be accounted for by the view that juries naturally take of damages in such cases. They consider them not merely as a compensation to the husband for the injury done to him, but also as a means of punishing the adulterer.

Upon the question, whether the verdict upon the issue of connivance was against evidence, his Lordship stated the substance of the evidence, and declined to grant a rule.

With respect to the motion on behalf of the co-respondent Halse, that he be dismissed from the suit, the 30th section of 20 & 21 Vict. c. 85, enacts: "In case the Court, on evidence "in relation to any such petition, shall not be satisfied that "the alleged adultery has been committed, or shall find that "the petitioner has, during the marriage, been accessory to or "conniving at the adultery of the other party to the marriage, ". . . then and in any one of the said cases the Court shall "dismiss the said petition." It seems to me that, being satisfied that the petitioner has connived at his wife's adultery, I am bound by that section to dismiss the petition, whether I am asked to do so by the co-respondent or by the respondent.

I am also of opinion that the co-respondent Halse is entitled to be dismissed from the suit, on the ground that, as the plea of connivance would have been a bar to an action for crim. con., it is a defence to claim for damages.

Mr. Sleigh and *Dr. Swabey* applied for an order as to costs.

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THE JUDGE ORDINARY reserved the question of costs, and ordered the formal dismissal of the petition to be suspended.

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Mr. F. H. Lewis, for the co-respondent Halse, moved the Court to condemn the petitioner in costs. In *Seddon v. Seddon and Doyle*, 2 Swab. & Tris. 640, where the petition was dismissed on the ground that the petitioner had been guilty of adultery, and of misconduct conducing to the adultery, Sir C. Cresswell, though he did not condemn the co-respondent in costs, refused to give him his costs. In that case, however, the petition was dismissed under the 31st section for conduct which was not an absolute bar to the suit, but merely a discretionary bar. The Court might in its discretion have granted a decree, and therefore it could not be said that the petitioner had no right to institute the suit. That may have been the reason for not condemning him in the co-respondent's costs. In this case the connivance of the petitioner is an absolute bar to the suit. He wantonly instituted a suit against the co-respondent, in which he could not possibly succeed if connivance was set up, and he ought therefore to pay the co-respondent's costs. In *Allen v. Allen and D'Arcy*, 2 Swab. & Tris. 107, where the petition was dismissed on the ground of connivance, it was dismissed with costs.

THE JUDGE ORDINARY: In that case the Court could not have intended to give the co-respondent his costs. He did not appear.

Dr. Swabey (*Mr. Starling* with him) for the respondent, asked for costs. A wife, when successful in a matrimonial suit, is entitled to all her costs. (He cited *Allen v. Allen and D'Arcy*; *Sopwith v. Sopwith*, 2 Swab. & Tris. 105.)

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Mr. Clare for the petitioner: The co-respondent having been found guilty of adultery, he is not entitled to his costs, although the petition has been dismissed on account of the husband's misconduct.

THE JUDGE ORDINARY: I think there is no pretence for condemning the petitioner in the costs of the co-respondent. The petitioner clearly proved the co-respondent's adultery, and the jury awarded him £50 damages, but they also found that the petitioner had connived at the adultery. The Court dismissed the petition under 30th section of 20 & 21 Vict. c. 85, and Halse was therefore dismissed from the suit. He now asks that, although the adultery charged against him was proved, the petitioner should be condemned in the costs of proving it. The case of *Allen v. Allen and D'Arcy* is no authority for so unreasonable an application, for it appears that there the co-respondent was not even served with the citation. Each case must depend on its own merits. There may be many cases in which it would be right to condemn the petitioner in costs, but this is not one of them.

As to the wife's costs, there is no doubt as to the principle upon which they are to be dealt with. In the Ecclesiastical Court a sum of money, sufficient to carry the wife through the suit, used to be paid to her proctor before the hearing. When this Court was established, and trial on oral evidence was substituted for trial on written evidence, a new system was inaugurated as nearly as possible conformable to that of the Ecclesiastical Court. An order was made that a registrar should estimate the costs of the trial as nearly as he could, and the husband, whether petitioner or respondent, was ordered to deposit in the registry, or give security to the satisfaction of the registrar for that amount, and to the extent of that sum the wife, although she fails in the suit, is entitled to her taxed costs of the hearing. Moreover, she has always been entitled, when she succeeds in a suit, to be placed in the

position of any other successful suitor and to receive her costs. That principle was explained by the late Judge Ordinary in *Sopwith v. Sopwith, Starkey v. Starkey and Irwin*, and many other cases. In this case the wife succeeded in establishing the defence of connivance, and the petition was dismissed, and she is therefore entitled to all her costs. The petition will be dismissed when those costs are paid. The registrar tells me that it is the practice not to dismiss the petition until that has been done.

Petition dismissed ; petitioner to pay respondent's costs. As between petitioner and co-respondents, no order as to costs.

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TAYLOR, AND
HALSB.

ROGERS, otherwise BRISCOE (falsely called HALMSHAW) v.
HALMSHAW.

Dissolution of Marriage.—Second Marriage de facto.—Decree of Nullity.—20 & 21 Vict. c. 85, ss. 56, 57.

June 30.

ROGERS,
otherwise
BRISCOE
(falsely called
Halmsshaw)
v.
HALMSHAW.

Where a final decree of dissolution of marriage was made on the 1st of June, 1860, and the respondent and co-respondent (the petitioner being still alive) went through a ceremony of marriage on the 20th of November, 1860, no appeal having been made to the House of Lords, which was prorogued on the 28th of August, 1860, and did not meet again for dispatch of business till the 5th of February, 1861:

The Court pronounced a decree of nullity of the marriage of the 20th of November, 1860.

This was a suit of nullity of marriage. The petition was as follows:—

1. That on the 28th of November, 1850, your petitioner, being then Sarah Tomlin Briscoe, spinster, was lawfully married to John Crane Rogers, at St. George's Church, Doncaster, in the county of York.

1864.

—
ROGERS,
otherwise
BRISCOE
(falsely called
Halmshaw),
v.
HALMSHAW.

2. That on the 1st of June, 1860, a final decree, dissolving your petitioner's said marriage with the said John Crane Rogers, was pronounced by Her Majesty's Court for Divorce and Matrimonial Causes.

3. That no appeal against the said decree was at any time presented to the House of Lords.

4. That at the expiration of three months after the pronouncing of the said decree Parliament was not then sitting, and that after the expiration of the said three months Parliament did not meet again until the 5th of February, 1861.

5. That on the 20th of November, 1860, and before the time by 20 & 21 Vict. c. 85, s. 56, limited for appealing against such decree dissolving your petitioner's said marriage had expired, your petitioner, by the name of Sarah Tomlin Briscoe, spinster, was in fact, though unlawfully, married to George Frederick Halmshaw, at the parish church of St. George's, Bloomsbury, in the county of Middlesex.

6. That on the said 20th of November, 1860, when the said ceremony of marriage was performed between your petitioner and the said George Frederick Halmshaw, the said John Crane Rogers was still living.

Your petitioner, therefore, humbly prays that this honourable Court will be pleased to declare that the marriage in fact, but illegally, celebrated on the said 20th of November, 1860, between your petitioner and the said George Frederick Halmshaw, is null and void, and that your petitioner is free from all bond of marriage with the said George Frederick Halmshaw, etc., and that your petitioner may have such further and other relief in the premises as shall to this honourable Court seem meet, etc.

Personal service of the citation and a copy of the petition had been dispensed with.

The respondent did not appear.

The petition now came on for hearing before the Judge Ordinary.

The evidence in support of the petition was as follows :—
 Certificates of the first and second marriages, and an office copy of the proceedings in the suit *Rogers v. Rogers and Halmshaw*, were put in. An officer from the House of Lords produced the original journals of the House, showing that Parliament was prorogued on the 28th of August, 1860, and that it did not again meet for the dispatch of business until the 5th of February, 1861. There was also evidence that the minutes of the proceedings in the suit *Rogers v. Rogers and Halmshaw* had been searched, and that no appeal had been presented against the final decree made on the 1st of June, 1860; that the petitioner's first husband (Rogers) was alive at the date of the second marriage; and the petitioner proved that she was the person who had married Rogers and Halmshaw, and was the respondent in the suit *Rogers v. Rogers and Halmshaw*.

1864.

ROGERS,
 otherwise
 BRISCOE
 (falsely called
 Halmshaw),
 v.
 HALMSHAW.

Dr. Deane, Q.C., and *Dr. Spinks*, for the petitioner, cited the 20 & 21 Vict. c. 85, ss. 56, 57; and *Chichester v. Mure* (falsely called *Chichester*), 3 Swab. & Trist. 223.

THE JUDGE ORDINARY pronounced the marriage of November, 1860, to be null and void.

TATHAM v. TATHAM AND NUTT.

June 9.

Petition for Dissolution.—Evidence.—20 & 21 Vict. c. 85, s. 43.

TATHAM
 v.
 TATHAM AND
 NUTT.

Under certain circumstances, the Court will exercise the power given it by the 43rd section of the Divorce Act, by calling the petitioner and examining him on oath as to some of the facts necessary to establish his petition.

1864.

June 9.

TATHAM
v.
TATHAM AND
NUTT.

This was the husband's petition for dissolution of marriage by reason of his wife's adultery with the co-respondent. No appearance had been entered either for respondent or co-respondent.

The adultery was alleged in the petition as follows:—"That in the months of July, August, and September, 1863, the said Emma Louis Tatham, on several occasions, committed adultery with Horace Nutt, at the petitioner's residence aforesaid, and so continued to commit adultery with him up to and on the 14th day of September."

Dr. Twiss, Q.C., and *Dr. Swabey*, conducted the petitioner's case. Counsel, in opening the case, said that statements were permissible to the Court which might be improper before a jury; the Court would only act on what was legally proved before it. That an important part of this case was within the knowledge of the husband only. That on the morning of the 14th of September he woke early and found that his wife had left the bed. After waiting a time he went in search of her, and ultimately found her in or on the bed of the co-respondent, who was his assistant, and slept in a room on the ground-floor (the petitioner was a medical practitioner); that a scuffle ensued in which Mrs. Tatham was struck by her husband. The co-respondent left the house the same day, and Mrs. Tatham in the afternoon.

The evidence of the servants in the house proved that a disturbance had taken place on the morning in question; that Nutt had gone off at once, and Mrs. Tatham later in the day; but none of them had seen Mrs. Tatham in Nutt's bedroom. The mother of the petitioner and the brother of the respondent proved certain admissions made by the respondent as to adultery having taken place between Nutt and herself on several occasions before the 14th of September, though she denied its having taken place on that morning.

At the end of the evidence in support of the petitioner's case,

THE JUDGE ORDINARY said: It seems hard that the Court should be deprived of the best evidence which the nature of the case admits. I understand that it has been the practice of the Court not to examine the petitioner, or to allow him to be examined to prove his own petition; and I do not think that his counsel have any right to make him a witness. But as to the power of the Court so to do, the words of 20 & 21 Vict. c. 85, s. 43, are very wide:—"The Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery." As I am clearly of opinion that this section gives the Court the power, I shall examine the petitioner in the present case, guarding myself against laying down any general rule as to what may be proper to be done in other cases, and especially in cases in which the respondent or co-respondent appear.

1864.

June 9.

TATHAM

v.
TATHAM AND
NUTT.

The petitioner was then sworn and examined by the Court. He proved the statement may by counsel in opening.

THE JUDGE ORDINARY: The missing link in the case is now supplied, and I pronounce a decree *nisi*.

[*Note*.—It seems a sound reason for being very sparing of the exercise of this power, that, as the law of evidence now stands, it is impossible for the respondent or co-respondent to be heard in contradiction to such evidence.]

1864.

June 15 & 28.

Cock
v.
Cock.

COCK v. COCK.

Wife's Petition.—Desertion.

A separation, which was never acted upon, either as to the husband and wife living apart, or as to certain stipulations about money matters contained in it, does not deprive the husband's subsequently leaving the wife against her will of the character of desertion.

This was a petition for dissolution of marriage by a wife on the ground of adultery, coupled with desertion. The respondent did not appear. The cause was tried before the Judge Ordinary on the 15th of June.

The *Queen's Advocate* and *Mr. Arthur Wilson* for the petitioner.

The marriage was in April 1838, and the cohabitation was at Plymouth, where the husband had carried on business as a grocer and draper. In 1856 he deserted his wife and went to live with another woman in Plymouth, and in 1858 he went to America. A deed of separation was put in evidence, executed in January 1856, some months previous to the desertion. It was proved that there had been cohabitation subsequent to the date of the deed. *Cur. adv. vult.*

THE JUDGE ORDINARY: In this case the petitioner proved to the satisfaction of the Court, that her husband had deserted her in the summer of 1856. He left this country for America some months afterwards, since which time she has never seen him. It was also proved that about the same time he also cohabited with another woman as his wife.

The case stood over that I might consider the effect of a separation deed entered into by the husband and wife in January 1856, some months before he left his wife. It is

clear that any separation between husband and wife, which is the result of mutual agreement, cannot constitute the "desertion" which the statute has made a ground of divorce. But in this case the parties continued to cohabit for some months after the deed was executed, and though the husband had covenanted not to interfere with the wife, but to allow her to live separate and apart from him, she had never availed herself of that permission. On the contrary, when he actually left her, it was against her strongly expressed wish. Furthermore, the deed contained an assignment of property and stock-in-trade and goodwill of his business to trustees, who were to carry on the business, make a certain allowance to the wife, and pay over a sum of £500 to the husband. These provisions were never acted upon, the trustees did nothing under the deed, and no money was paid to either husband or wife. Lastly, the deed contained a clause to the effect, that if the stipulated £500 was not paid to the husband the whole deed was to be void.

Considering these provisions in connection with the conduct of the parties, it seems more than probable that the wife's account of it was correct, and that its real object was to defeat the husband's creditors, and save something from his insolvency, which overtook him shortly afterwards. Be this as it may, the Court cannot, contrary to the manifest fact, consider the bare existence of this deed as a proof that these parties separated by mutual consent. The separation was the act of the husband alone, and the wife is entitled to the relief she prays.

1864.
June 15 & 28.

Cock
v.
Cock.

1864.

June 21 & 28.

BASING v. BASING.

BASING
v.
BASING.

Wife's Petition for Dissolution.—Desertion.

Where the husband has been guilty of adultery and desertion for two years and upwards, an offer to return to cohabitation can be no bar to the wife's petition on the ground of adultery and desertion, for she is under no obligation to condone the adultery.

This was a petition by a wife for dissolution, on the ground of adultery, coupled with desertion. The respondent did not appear. The cause came on for hearing before the Judge Ordinary on the 23rd of June.

Dr. Spinks conducted the petitioner's case.

Evidence was given of marriage in July, 1851, and of cohabitation in different parts of London until September, 1853, when the respondent went to Australia, leaving the petitioner in London. He had been guilty of adultery in Australia. The evidence as to desertion is stated in the judgment.

Cur. adv. vult.

June 28.

THE JUDGE ORDINARY: In this case the evidence showed that the respondent had left his wife and this country for Australia some years ago, under a promise that he would send for her to join him. He ceased to correspond with her in 1857, and from that time until 1862 she did not hear of him, or know where he was. He forwarded her no money at any time after he left this country. In 1862, after having for some time carried on an adulterous intercourse with a servant living at a place called Separation, near Ballarat, in Australia, he wrote his wife a letter, in which he confessed the wrong he had done her, promised amendment, and begged forgiveness, but he made no distinct offer to provide her with a home. She rejected his overture, and filed this petition for a divorce,

on the ground of desertion coupled with adultery. The only question in the case was, whether this letter, if it amounted to an offer to renew cohabitation with his wife, could be any bar to her right to a divorce on the above ground. I am of opinion that it was not. The petitioner was not bound to condone her husband's adultery, and take him back. The necessary period of desertion was complete before the letter was written. Supposing that it were in any case necessary under the statute to show that the desertion continued up to the filing of this petition, such necessity could not apply to a case in which the husband had in the meantime created a bar to his wife's return by the commission of adultery.

1864.
June 21 & 28.
Basing
v.
Basing.

M— (falsely called H—) v. H.

June 25 & 29
and July 12.

*Woman's Petition for Nullity.—Traverse of alleged Frigidity.
—Evidence.—Practice.*

M—
(falsely called
H—)
v.
H—.

M. petitioned for a decree of nullity of marriage by reason of the alleged frigidity, etc., of H., the man, owing to which the alleged marriage had not been consummated. H. traversed the alleged frigidity, etc. At the hearing H. gave evidence that the non-consummation was caused by the pain felt and distress expressed by M. when he attempted to have connection. The evidence was objected to on the ground that such cause of non-consummation should have been alleged in the answer, but the Court admitted the evidence, saying, that evidence in reply might be called, if the Court should think that the petitioner was taken by surprise.

The marriage took place in December, 1860, and the parties cohabited for nearly three years. The medical certificate stated the virginity of the woman and the apparent potency of the man. The woman gave evidence of ineffectual attempts on the part of the man, and denied any unwillingness on her part. The man gave evidence as above suggested.

1864.
June 25 & 29,
and July 12.

M—
(falsely called
H—)
v.
H—.

The Court held, that it could not presume impotency, under such circumstances, with a cohabitation short of three years. That if the presumption arose it was rebutted by the man's account of the cause of non-consummation, to which, along with other circumstances in evidence, the Court gave faith, and refused the decree of nullity, but suspended any positive decree on the expressed hope that the woman would return to cohabitation.

This was the woman's petition for a decree of nullity by reason of the alleged impotence of the man.

The petition, dated the 21st of October, 1863, stated, first, the fact of marriage, on the 11th of December, 1860, the petitioner then being about twenty-four years of age, and the respondent twenty-six; secondly, that from the said 11th of December, 1860, the petitioner lived with the said H. at, etc., but that the said H. was at such time, and had ever since continued, wholly unable to consummate his said marriage by reason of the malformation of his parts of generation, and that such malformation is incurable by art or skill; thirdly, that the said H. was at the time of his said marriage, and had ever since continued, wholly unable to consummate the said marriage by reason of the frigidity and impotence of his parts of generation, and that such frigidity and impotence of his parts of generation are wholly incurable by art or skill.

The respondent's answer alleged, first, a lawful marriage on the 11th of December, 1860; secondly, denied that at the time of or since the said marriage, he, the respondent, by reason of the malformation of his parts of generation, had been unable to consummate the said marriage as stated in the second paragraph of the said petition; thirdly, denied (*mutatis mutandis*) as to the frigidity or impotence.

The reports of the medical examiners were as follows:—

“ Feb. 25, 1864.

“ We, the undersigned, have this day carefully examined
“ the parts and organs of generation of M—, and we certify
“ that there is no natural defect or malformation which would

"prevent the due performance of matrimonial intercourse, and 1864.
 "that there is a perfect hymen, and that the said M—— is June 25 & 29,
 "a virgin. and July 12.

"ARTHUR FARRE,

"FRED. C. SKEY."

M—
 (falsely called
 H—)

H—.

"We, the undersigned, have this day carefully examined
 "the parts and organs of generation of H——, and we certify
 "that there is no malformation nor defect of these parts, and
 "that there is no appearance indicating a want of virile power.

"ARTHUR FARRE,

"FRED. C. SKEY."

The case was heard before the Court itself.

Dr. Spinks and *Mr. Searle* for the petitioner.

Dr. Deane, Q.C., and *Dr. Middleton* for the respondent.

The petitioner, in her evidence, denied that the marriage had been consummated, or that the non-consummation was owing to any refusal or apprehension of pain on her part. Besides other witnesses, Dr. Farre was called on behalf of the petitioner. He was cross-examined as to the process of dilation being in some cases necessary to enable consummation to take place. It appeared that in the spring of 1863 the respondent had a severe attack of smallpox, which laid him up for many weeks, during which time the petitioner was most assiduous in her attention to him. The immediate cause of the breaking up of their home was, that his farming business was unsuccessful, and a sale of stock and furniture, etc., became necessary.

Dr. Deane, in opening the respondent's case, said, that the non-consummation was due to the fear expressed and resistance made and pain felt by the petitioner when connection was attempted, and that the respondent had desisted in consequence.

1864. *Dr. Spinks* objected, that on the pleadings, which merely
 June 25 & 29, traversed the frigidity, etc., such evidence would be inadmis-
 and July 12. sible. But the Court overruled the objection, and said that
 M— if, in the course of the case, it should be of opinion that the
 (falsely called H—) petitioner was taken by surprise by such a line of defence, the
 H— hearing might be adjourned for evidence to rebut.

Dr. Deane contended, that the rule of triennial cohabitation had only been broken in upon when the man had either refused to submit to inspection, or had, howsoever, admitted his inability to consummate.

The respondent was then sworn, and deposed to the effect stated by his counsel.

Mr. Skey was then called, and stated in substance:—I know Mr. H— as a patient. I and Dr. Farre examined him under an order of this Court. Previously he had consulted me professionally as to non-consummation of the marriage. I examined him carefully about two months before the examination with Dr. Farre. I examined his loins, thighs, etc. Vigorous and healthy in all respects, to all appearance. Organs of generation perfectly healthy—rather more than usually vigorous in dimensions and appearance. I also examined Mrs. H—. Found her a perfect virgin. Cases of dilation are comparatively rare in the practice of any one man. I heard Dr. Farre's evidence as to the process being followed by birth of children. I have known instances in my own practice; in two cases after several years' cohabitation, and in three or four others after two or three months.

Cross-examined: I agree with Dr. Farre in saying that in this lady's case there was nothing requiring the process of dilation. I think there was more than ordinary development in the man's organs.

In answer to the Court: Consummation of marriage might have been attended with more than usual pain on the part of the wife.

Certain evidence in reply was called to contradict particular statements made by H—— in his evidence.

Cur. adv. vult.

1864.

June 25 & 29,
and July 12.

M—

(falsely called
H—)

W.

H—.

July 12^o

THE JUDGE ORDINARY: In this suit the Court is asked to pronounce the marriage of the parties null and void on account of the incurable impotence of the husband.

The undoubted facts are, that the marriage has not been consummated; that the lady is a virgin, and without defect; that the husband has no visible defect either,—on the contrary, has every outward sign of perfect health and vigour; and that the parties had cohabited two years and ten months, during by far the greater part of which they have occupied the same bed. No proof is given of the husband's impotence; but the Court is asked to infer it from the fact of the wife being still a virgin, together with her statements that he often attempted consummation, but without effect. There was nothing in these statements to throw light upon the cause of his failure. On the other hand, the husband swore that he had desisted from enforcing his marital rights by reason of the marked repugnance of the wife. He spoke of the pain and distress she evinced on all attempts of the kind, saying that she turned cold with dread on his approaching her, and sometimes quitted his bed. And he asserted that the non-consummation of the marriage was due only to consideration for her, and forbearance on his part. All this she denied.

It becomes the duty of the Court to weigh these conflicting statements, and having formed a belief on the facts, to apply the rules of law. But I may premise that the Court is bound for obvious reasons, before declaring a marriage void, to see its way with tolerable certainty, and proceed with a measured and jealous caution. Now, what is the rule of law? Where a visible defect of an incurable nature announces the incapacity of man or woman, the Court acts upon it without regard to the length of cohabitation (*Greenstreet v. Cumyns*,

1864.

June 25 & 29,
and July 12.

—
M—
(falsely called
H—)
v.
H—.

2 Phil. 10); and the like has been done when the marriage, after a cohabitation of sufficient length to overcome any temporary impediments, has clearly not been consummated, and when by the admissions or acts of the party charged, his refusal to submit to inspection, or other independent circumstances, the Court is satisfied "beyond a doubt" (I quote from 2 Rob. 618) of the incurable impotence alleged. Such were the two cases in 2 Rob. pp. 618-625. But, subject to these exceptions, there is a well-known and valuable rule adopted of old time for the guidance of the Court, that impotence shall be presumed after three years of ineffectual cohabitation, and shall not be presumed before. The rule ought therefore to be applied.

But if it were otherwise, and the Court were permitted to presume the respondent's impotence, although the three years' cohabitation have not elapsed, still such presumption must be open to rebuttal by positive and satisfactory evidence that the result is due to other causes, and in my opinion there is such evidence in this case, for I give credence to the respondent's account. It is a strong fact in favour of his truth, that although the matter was known to his wife's mother within three months of the marriage, no complaint, no expostulation was heard from the lady herself, or, what might be more natural, from either of her parents. It is also a strong circumstance that, so little were the parents inclined to impute blame to the respondent, or to question the marriage, they were parties to a proposition for the respondent to leave this country with the petitioner as his wife, to try his fortunes in Australia. The evidence of Mr. Skey, the surgeon who spoke of the unusual suffering likely to result from the consummation of the marriage, shows the husband's account to be not improbable.

But more cogent still is the conduct of the parties just before this suit was commenced: as soon as the respondent became insolvent the parents took charge of their daughter.

It was then they first charged the respondent with not being really their son-in-law. He was not allowed to see his wife alone, and under their influence she refused to go away with her husband, although, up to this time, and indeed until within a few days of the petition being filed, her letters and actions displayed no lack of the affection which had ever subsisted between them. There has, therefore, been no opportunity afforded to consummate this marriage since the charge of impotence was first made.

Under these circumstances the Court is not prepared to accede to the prayer of the petitioner, and proposes to suspend its decree altogether for the present. This will spare the petitioner much if, after a renewed cohabitation, and all reasonable conduct on her part, she should still be in a position to complain that the marriage has not been consummated. But it may be that she will desire to question this decision in a Court of Appeal; and if so, I am prepared to pronounce a final decree in favour of the respondent. A like decree must be pronounced if she refuses to return to her husband forthwith.

1864.

June 25 & 29,
and July 12.

M—
(falsely called
H—)
v.
H—.

PRICHARD v. PRICHARD.

July 12.

Husband's suit for Judicial Separation.—Cruelty.—Alimony.

PRICHARD
v.
PRICHARD.

Though the physical effects of the wife's violence may not generally be so serious to the personal safety of the husband as the effects of his violence towards her, yet the moral result of the wife's violence to all the proper relations of married life is so serious, that the Court will interfere, and not drive the husband to the necessity of meeting force by force.

In such cases the Court will expect some provision to be made for the maintenance of the wife; overruling *White v. White*, 1 Swab. & Tris. 591; and *Dart v. Dart*, 3 Swab. & Tris. 209.

Jordan Pg 1 — 11.

1864.

July 12.

PRICHARD

v.

PRICHARD.

This was the husband's suit for judicial separation by reason of the wife's cruelty. There was no answer to the petition. The nature of the facts are sufficiently shown in the judgment.

Dr. Spinks conducted the petitioner's case.

Cur. adv. vult.

THE JUDGE ORDINARY gave the following judgment:—The facts of this case disclosed great violence on the part of the wife, and great forbearance on the part of the husband. The husband seeks the protection of the Court. And I reserved the case that I might consider the extent of this violence, its probable effect on his health and safety, and the degree to which his right to relief depended on such considerations.

The cohabitation of the parties has been very long; and there is a large family, many of them now grown up. The great and unrestrained violence of the wife, her irritability on all, even the slightest occasions, her bursts of unprovoked ill-temper, and the abuse she habitually heaped on her husband, were fully proved. But she went further. She ventured from time to time to lift her hand against him. She added personal outrage to the degradation of foul language. Emboldened by a policy of passive resistance which during the last fifteen years he had adopted from religious motives, she sought to rule his conduct by threats of personal attack; and finally, she thrust herself before him on the steps of a public chapel, the service of which he was attending against her will; assailed him with abuse and blows, and as the sole refuge from an unseemly struggle, drove him with ignominy home. The excitement caused by this unwomanly deed, and perhaps still more the nervous shock sustained by him in the necessary effort of self-restraint, induced a fit and much mental and bodily suffering.

On review of this evidence I am not sure that I ought to draw the conclusion that the safety of the husband is im-

perilled. I do not believe that his wife ever intended or is likely to do him serious harm by personal violence. But violence by the husband and similar conduct in the wife hardly deserves to be considered in the same identical light. Repeated bodily injury inflicted by the stronger party portends little safety to the weaker. There is nothing to restrain a man in such encounters but himself. Where the woman is the assailant it is otherwise, and many a man may submit to the outrage of a blow, who would defend himself from real injury if imminent. But if the physical effects of violence by the wife are less, the moral results are immeasurably greater. How is it possible that submission, which is the wife's lot in marriage, can be maintained by the husband if she become his assailant? The mutually dependent duties of the marriage state suffer a hopeless confusion in such an inversion of parts. Indignity and loss of self-respect undermine the position of the husband, and release the wife from all moral control. Cohabitation on the terms of the marriage contract ceases to be longer possible. But worse than all, the man is incited to the retaliation of force, perhaps driven to violence in self-defence. And if holding its hand this Court refuse to relieve him from the perils of provocation, what security is there for the safety of the wife herself?

These considerations satisfy me that the petitioner ought to be judicially separated from his wife; and I am prepared to pronounce a decree to that effect. But some provision must be made for her; and the decree must provide for that, if it has not been already done.

Dr. Spinks stated that it had been held that this Court on such a decree had no power to make any order for alimony, or to annex any such condition to the decree for judicial separation.

THE JUDGE ORDINARY: I am aware of the cases to which

1864.

July 12.

PRICHARD

v.

PRICHARD.

1864. you allude, but I think, if there is no precedent, I ought to
July 12. make one.

PRICHARD
v.
PRICHARD.

1863. ROOKER v. ROOKER AND NEWTON.
November 24.

ROOKER
v.
ROOKER AND
NEWTON. *Dissolution of Marriage.—Evidence.—Foreign Marriage.—
Identity.*

A marriage proved by evidence that the parties had cohabited as man and wife, and that, by the law of the country where the marriage was contracted, such cohabitation constituted a valid marriage. Identity proved by circumstantial evidence.

This was a petition by the husband for a dissolution of his marriage. No appearance was entered by the respondent. An answer was filed by the co-respondent, traversing the charge of adultery. The cause was heard before the Judge Ordinary on the 18th of November.

Dr. Deane, Q.C., and Mr. Thrupp, for the petitioner.

Mr. A. S. Hill for the co-respondent.

Cur. adv. vult.

THE JUDGE ORDINARY: This was a suit promoted by the Rev. William Yates Rooker, praying for a dissolution of his marriage on the ground of his wife's adultery. The adultery was satisfactorily proved at the trial, and the case stood over, that the Court might consider whether sufficient evidence was given of the marriage.

Upon careful consideration of the evidence, I am of opinion that the marriage was sufficiently proved. It appeared from the statement of the petitioner's brother, James Rooker, that in 1842 the petitioner was resident in America, and that in

1843 he came back to this country with a lady whom he introduced as his wife, and who is undoubtedly the respondent in this suit. The history of this lady, from the time of her so coming to this country in 1843, is very clearly proved by the evidence, which proves her name to be "Sarah Massenburgh "Rooker," and which brings home to her the act of adultery, upon which the suit is founded. It is also very clearly proved by the affidavit of Mr. Mason that, in the year 1842, the law in the State of Virginia did not require any religious ceremony for the celebration of a valid marriage, and that the "mere cohabitation of a man and woman who proclaim themselves, and are received in society as man and wife, constituted in the eye of the law a valid marriage." Further, that in 1842 there was "no law in Virginia requiring any registry or record to be kept of a marriage," though he believed the law has been since altered. He then states, that owing to the war now being carried on in Virginia, the record of any religious ceremony of marriage, which might have taken place, cannot be obtained. He goes on to state that William Yates Rooker was many years ago, and, as he believed, in 1842, rector of Christchurch, Winchester, Virginia, and that for five years he and Sarah Massenburgh Rooker resided together as man and wife in the parsonage, and were received and acknowledged as such by himself and his family and his whole congregation.

A marriage is thus proved, and the only remaining question is one of identification. Now, identification is a question of fact, to be proved, like any other conclusion of fact, either by direct or circumstantial evidence. It was urged by the co-respondent's counsel that a direct oath to the identity of the respondent was necessary. But to hold the rule thus stringently, and to require the direct oath of a witness, would be to add nothing in many cases to the cogency of the proof, while it might add much to the difficulties attending its production. All human testimony is of uncertain stability, and

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the direct oath of a witness is quite as capable of leading the Court astray by mistake or design as a number of independent facts pointing to one and the same conclusion.

What, then, is the evidence in this case? The identity of the petitioner as a clergyman, who was rector of Christchurch, Winchester, in 1842, is made out by the testimony of his brother, who says he did occupy that position. The identity of the respondent, who came over here as his wife in 1843 with the lady whom Mrs. Mason described as living with him as his wife at Winchester in 1842, is made out plainly, if not simply, for Mr. James Rooker says that his brother went back with his wife in 1843 to Winchester, Virginia, and after some time removed to Kentucky. This accords with Mr. Mason's testimony, who speaks of the couple as living together five years at Winchester. James Rooker stated, further, that it was in May, 1843, that he first saw Mrs. Rooker; that she had sent him a letter previously (which he had destroyed), in which she said that she had become his brother's wife, and was very anxious to be introduced to the family; that this letter was dated from Winchester, and arrived here in October, 1842, and that it was in the same writing as more letters produced at the trial, and proved to be that of the respondent; that she also sent him a newspaper (since destroyed) containing the announcement of her marriage; that she added in her letter that she was in the family-way, and could not come over till the next year to this country to see her husband's relatives. These circumstances convince the Court that the person who visited this country in 1843 as the respondent's wife was the same person of whom Mrs. Mason speaks under the same name of Sarah Massenburgh Rooker, and whom he describes as the wife of the petitioner, residing at Winchester, Virginia, in 1842. I therefore pronounce a decree *nisi*.

Decree nisi.

NOKES v. NOKES.

1868.
December 8.*Alimony.—Net Income from Trade.—Income from Houses.—
Deduction.—Fuller Answer.*NOKES
v.
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It is not sufficient to specify the amount of net annual income derived from trade in an answer to a petition for alimony. The gross annual income, and the deductions, must be specified.

It is also necessary to specify the gross rental of houses from which income is derived, and to give particulars of the charges and outgoings, in respect of which deduction is claimed.

The wife, in her petition for alimony, *pendente lite*, alleged that the husband had for many years carried on the business of a bootmaker at etc., and from such business derived the net annual income of £200; that he was possessed of a freehold estate at King's Lynn, yielding a net annual rent to him of £50; that he was possessed of stock in trade in his said business and ready money to the value of £700.

The husband, in his answer, alleged,—“ 1. My net annual income derivable from my said business, after payment of workmen and assistants' wages, cost of gas, and renewal of plant and tools, is £130, less income tax. 3. My estate in Lynn consists of a few perches of land and several houses in High Street, Purfleet Street, and Coburg Street; the gross rent of the houses in High Street and Purfleet Street is £84. 19s., the interest on the mortgage thereof £45, the landlord's taxes are £8. 14s., and the cost of repairs and loss on empty houses exceeds £20 per annum; leaving a net income from the houses in High Street and Purfleet Street of £10. The rent of the houses in Coburg Street is £24, but the whole of that amount is absorbed in interest on the mortgage thereof, rates, taxes, and repairs. The rent of the land is £4, making together a net rental income from my estates of £14, and no more. The houses in High Street and Purfleet Street are old houses, and the income from all house pro-

1863. "perty in King's Lynn is very precarious. 4. To the best of
December 8. "my judgment I value my stock in trade at £450."

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Mr. Douglas Brown moved for an order for a further and fuller answer. The objection to the first paragraph was, that it did not state the amount of the gross income, and the deductions which the husband claimed to make from it. The objection to the third paragraph was, that it did not state the gross rental of each of the houses, and the amount of the mortgages and outgoings, in respect of which deduction was claimed. The fourth paragraph ought to contain a fuller statement as to the value of the stock in trade. *Crampton v. Crampton*, 82 L. J., P. M. & A. 142.

Dr. Spinks, contra.

THE JUDGE ORDINARY: The answer must be amended by stating in the first paragraph the amount of the gross income derived from the business, and specifying the deductions. He must also state, in the third paragraph, the gross rental of the several houses, and give particulars of the mortgage and of the outgoings, which he claims to deduct from the rent. I think the answer is sufficient as to the stock in trade.

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BOWEN
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intervening). *Decree Nisi.—Time for Entering Appearance and Filing Affidavits in Opposition.—Queen's Proctor.—Costs.—23 & 24 Vict. c. 144, s. 7.*

Any person, and the Queen's Proctor as one of the public, may enter

an appearance and file affidavits in opposition to a decree *nisi* being made absolute, at any time before it is made absolute.

Where the Queen's Proctor does not intervene in his official capacity, but appears as one of the public, the Court has no authority to award him his costs.

This was a petition by a husband for a dissolution of marriage. No appearance by respondent or co-respondent.

On November the 13th, 1863, a decree *nisi* was pronounced in the usual form, declaring that the marriage "be dissolved "unless sufficient cause be shown to the Court why this decree "should not be made absolute within three months from the "making hereof." On the 17th of February, 1864, the usual affidavits were filed, stating that three months had elapsed from the date of the decree *nisi*, that no appearance had been entered by any person in opposition to the decree, and that the Queen's Proctor had not obtained leave to intervene. On the 19th of February, without obtaining leave to intervene, the Queen's Proctor entered an appearance, and filed affidavits to the effect that the petitioner had been guilty of adultery.

Dr. Spinks, on behalf of the petitioner, now moved the Court to make the decree absolute. The question is whether the Court has power to refuse to make a decree *nisi* absolute upon the Queen's Proctor entering an appearance and filing affidavits in opposition to the decree after the expiration of three months from the pronouncing of the decree *nisi*, no person having during that period taken any steps in opposition to the decree, and the Queen's Proctor not having obtained leave from the Court to intervene. If the decree had been obtained by fraud, the Court would have the power, possessed by every Court, of rescinding the decree. But in the absence of fraud, and none is suggested, my position is that under the circumstances his right to a decree absolute has accrued to the petitioner, and that the Court has now no right to receive the affidavits, or to pay attention to the appearance en-

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1864. tered. The question turns upon the construction of 23 & 24
February 23. Vict. c. 144, s. 7. That section is divisible into two distinct
 branches: the first enables *any person* to show cause against
 a decree being made absolute; the second empowers the
 Queen's Proctor in his official capacity to intervene by leave
 of the Court. There are, as was said by Sir C. Cresswell, in
 Boulton v. Boulton and Page, 2 Swab. & Tris. 551 and 638,
 two courses open to the Queen's Proctor. He can either in-
 tervene by leave of the Court, or come in as one of the public,
 under the first branch, and show cause against the decree;
 but he cannot do both. Here he has not obtained the leave
 of the Court to intervene, but he has entered an appearance
 and has filed affidavits in opposition to the decree, the course
 which, under the 17th and 18th of Further Rules, must be
 taken by any person wishing to show cause against a decree
 being made absolute. The Queen's Proctor therefore in this
 case is proceeding under the first branch of the section as one
 of the public; and he is therefore in no better position than
 any one of the public. It is only during a certain period that
 one of the public is at liberty to show cause, the words of the
 act being "and *during that period* any person shall be at
 liberty, etc., to show cause." The only period mentioned in
 the preceding words is, "such time not less than three months
 "from the pronouncing thereof (*i. e.* the decree *nisi*) as the
 " Court shall by general or special order from time to time
 " direct." No period has been fixed by any general order, for
 as to that the rules framed under the 7th section are silent;
 but the decree itself limits the time for showing cause to three
 months. Three months therefore is the "period" referred
 to. In this case the three months expired on the 13th of
 February, and on the 14th the petitioner had an indefeasible
 right to the decree absolute, so far as concerns the first branch
 of the 7th section. The appearance entered and affidavits
 filed by the Queen's Proctor are therefore nullities, and the
 decree should be made absolute. If, however, the Court en-

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tertains any doubt as to its power to make the decree absolute, I ask it, as the question is one of much importance, not to decide it now, but to direct that it be argued before the Full Court; for if it is now decided against the petitioner, inasmuch as the Court is sitting as the Full Court, he can only appeal to the House of Lords, and this it is practically impossible for a poor man to do.

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Mr. Searle for the Queen's Proctor.

Dr. Spinks objected that he had no right to appear.

THE JUDGE ORDINARY: He is going to appear, in order that he may argue that he has a right to appear. It is all one question.

Mr. Searle: If the statute had directed that at the expiration of three months from the pronouncing thereof a decree *nisi* should, *ipso facto*, become absolute, there would have been some weight in the argument for the petitioner. But a decree can only be made absolute by the act of the Court. It is a fallacy to assume that the "period" mentioned in the statute is three months from the date of the decree *nisi*. It is the interval between the pronouncing of the decree and its being made absolute.

THE JUDGE ORDINARY: The language of the second branch of the section seems to me to be a conclusive answer to *Dr. Spinks's* argument. Under that section "at any time before" the decree is made absolute any person may give information "to her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient." Now, a decree may not be made absolute until some time after the expiration of the three months from the date of the

1864. decree *nisi*. It would be futile to give information to the
 February 23. Queen's Proctor after that period had elapsed, if the petitioner
 had already an absolute right to the decree.

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Mr. Searle: That would be so if the words "may there-
 upon take such steps as the Attorney-General may deem
 necessary or expedient" would enable the Queen's Proctor,
 under the direction of the Attorney-General, to show cause
 under the first branch against the decree as one of the public,
 and they are capable of that construction. *Boulton v. Boulton
 and Page* is a distinct authority that the Court may refuse to
 make the decree absolute. In that case, the facts of which
 were somewhat like the present, after the expiration of three
 months from the pronouncing of a decree *nisi*, the Court was
 moved upon the usual affidavit to make the decree absolute.
 On behalf of the respondent and co-respondent, and founded
 upon affidavits sworn by them, an application was made to the
 Court to postpone making the decree absolute, on the ground
 that a trick had been practised upon the Court, and that the
 petitioner had been guilty of bigamy. The Court refused to
 make the decree absolute, and directed that the Queen's
 Proctor should be informed that the affidavits had been filed.
 It was contended that the respondent and co-respondent had
 no right to show cause against the decree being made abso-
 lute. Sir C. Cresswell said: "The decree cannot be made
 absolute without the act of the Court. I shall certainly not
 make it absolute until the matter has been cleared up."
 Ultimately the petition was dismissed. That decision is a
 conclusive answer to the argument that a petitioner, at the
 expiration of three months from the date of a decree *nisi*, has
 an indefeasible right to a decree absolute, if there has been
 no appearance in opposition to the decree, and the Queen's
 Proctor has not obtained leave to intervene. It shows that
 the Court, if it has reason to suspect that there are circum-
 stances in the case which demand inquiry, will refuse to make

a decree absolute until they are cleared up. The intention of the Legislature seems clearly to have been to empower any person, and especially the Queen's Proctor, to intervene at any time before a decree *nisi* is made absolute. If the terms of the decree are inconsistent with the provisions of the Act of Parliament, the latter must prevail.

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Dr. Spinks, in reply: Under the second branch of the 7th section the Queen's Proctor, undoubtedly, may in his official capacity intervene at any time before the decree is made absolute, even though three months from the date of the decree have expired; but the leave of the Court is a condition precedent to such intervention, and that he has not applied for. The argument on the other side simply comes to this:—the Queen's Proctor might, by adopting a certain course, have opposed the decree after the expiration of the three months. The answer to that argument is, that he has not taken that course, but has proceeded under the first branch of the section.

THE JUDGE ORDINARY: I suppose the Queen's Proctor intends, under the direction of the Attorney-General, to apply for leave to intervene.

Mr. Searle: The Queen's Proctor is acting under the direction of the Attorney-General.

THE JUDGE ORDINARY: I suppose he intends to ask for leave to intervene. The Court would not act merely upon these affidavits without further inquiry.

Dr. Spinks: The affidavits show that there has been laches on the part of the Queen's Proctor in not coming sooner to the Court. They were dated on the 5th of February, and were filed on the 19th. The Queen's Proctor is not entitled to any

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more favour than a party to the suit. If the Court refuses to make the decree absolute, I ask that the petitioner may have leave to answer the affidavits filed by the Queen's Proctor, and that the whole matter may be argued before the Full Court.

THE JUDGE ORDINARY: I am clearly of opinion that the hands of the Court are not tied in the way Dr. Spinks has contended. The construction he puts upon the statute is, in my opinion, contrary to the letter of the Act and to the obvious intention of the Legislature, which was, that up to the last moment an opportunity should be given to every person, and especially to the Queen's Proctor, of preventing a decree *nisi* for dissolution of marriage being made absolute if there were grounds for rescinding it. I am, therefore, clearly of opinion that I cannot now make the decree absolute.

With respect to the other part of the application, I do not propose to give any directions at present as to the mode in which this question is to be brought to an issue. It may be that the Queen's Proctor, acting under the direction of the Attorney-General, will ask for leave to intervene, and have certain issues tried. Therefore I cannot anticipate the course that may be taken hereafter; but this I may say, that if the Queen's Proctor does not within a reasonable time take some definite course, and the petitioner again brings the matter before the Court, I shall then know how to deal with it. Meanwhile I cannot confine him to any particular course, because it is a question for the discretion of the Attorney-General, whether the Queen's Proctor should apply for leave to intervene in the suit in order that he may prove his case.

May 3.

The Attorney-General (Mr. Hannen with him) moved that the petition might be dismissed. The affidavits establish that the petitioner has been living in adultery with one Sarah Hughes, and that he has had a child by her since the decree

nisi was pronounced. The House of Lords has decided in 1864.
Latour v. Latour and the Queen's Proctor (House of Lords May 8 and 23.
 Cases), that the Court has no power to give the Queen's
 Proctor his costs, unless collusion is proved. As there is no
 proof of that, I do not ask for costs.

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Dr. Spinks, for the petitioner, said that he could not resist the motion.

THE JUDGE ORDINARY: The decree *nisi* must be rescinded and the petition dismissed. The Queen's Proctor has not intervened under the latter branch of the 7th section of the 23 & 24 Vict. c. 144, on the ground of collusion, but is showing cause against the decree under the first branch; there will, therefore, be no order as to costs.

Petition dismissed. No order as to costs.

CHILD v. CHILD.

March 22.

Practice.—Dissolution.—Time for entering an Appearance.

CHILD
 v.
 CHILD.

An appearance may be entered in a matrimonial suit at any time within twenty-one days of the service of the citation.

This was a petition for dissolution of marriage. More than eight days had elapsed since the service of the citation, and no appearance had been entered.

Mr. Searle, for the petitioner, moved for directions as to the mode of trial.

THE JUDGE ORDINARY: The motion is premature, as

1864. twenty-one days have not elapsed since the service of the
March 22. citation and petition.

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Mr. Searle: There is no time fixed in the rules for entering an appearance. The 14th rule is that an answer is to be filed within twenty-one days of the service of the citation; but the form of the citation is, "that within eight days of the service of this on you, inclusive of the day of such service, you do appear in our said Court," etc.

THE JUDGE ORDINARY: It is the practice to allow twenty-one days from the service of the citation for entering an appearance.
Motion rejected.

March 11 and
June 14.

CARSTAIRS v. CARSTAIRS, DICKENSON, AND OTHERS.

CARSTAIRS
v.
CARSTAIRS,
DICKENSON,
AND OTHERS.

Co-respondent.—Not Guilty of Adultery.—Petitioner not Condemned in Costs.—Property of Wife found Guilty of Adultery.—Settlement.—Sect. 45 of Divorce Act.—Petitioner's Costs.

Where the co-respondent has acted with imprudence with a person whom he knew to be a married woman, the Court will leave him to pay his own costs.

Where the respondent (the wife) became entitled in possession to £500 after the decree *nisi*, but before the decree absolute was pronounced, and was proved to have been guilty of very gross misconduct, and to have put the petitioner to heavy expense by opposing his petition, the Court declined to order a settlement of any portion of the fund on the petitioner in satisfaction of part of the costs incurred, as the wife had no other means of subsistence. If the sum had been larger in amount, a settlement would have been ordered to be made under sect. 45 of the Divorce Act.

This was an application on the part of the petitioner, under

the 45th section of the Divorce Act, for the settlement on him of a portion of his wife's property.

In this case the Court, on the 11th of March, 1864, pronounced a decree *nisi* on the ground of the respondent's adultery with Dickenson, one of the co-respondents, and condemned him in costs.

The jury, by their verdict, found that the two other co-respondents, Billson and Biggs, had not been guilty of the adultery charged: whereupon,—

Dr. Swabey, for Billson, and *Mr. Bridges*, for Biggs, applied for the petitioner to be condemned in the costs incurred by them respectively.

Dr. Tristram, contra.

THE JUDGE ORDINARY: I do not think I ought to make the petitioner pay the costs of either of these co-respondents. They both knew that the respondent was a married woman. Neither of them appears to have been on friendly terms with or to have visited her husband; and yet, according to the evidence, Billson was seen as late as between nine and ten o'clock one night walking about with the respondent in Malling Wood, under circumstances which would not unnaturally excite suspicion, and Biggs was also seen one night, in the dark, standing with her at a stile in a field under circumstances also suspicious. There was not sufficient evidence to establish adultery against either of them, yet their imprudence has been such, that I shall leave them to pay their own costs.

On the 12th of April, 1864, the respondent, by the death of her father, became entitled in possession, under her grandfather's will, to property of the value of from £450 to £500. By the affidavit of the petitioner, it appeared that the co-respondent Dickenson had absconded, and was without means

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to pay the costs; that the respondent's costs already paid by the petitioner amounted to £105. 16s. 6d.; that his own costs would amount to from £350 to £400, and that during the last year of his cohabitation with his wife, she had, without reasonable ground, incurred debts, which he had paid, to the amount of £100. The petitioner, who was a commercial traveller, had been obliged to borrow £500 to meet these expenses.

Dr. Tristram moved the Court to direct a settlement to be made on the petitioner out of the property to which the respondent was now entitled in possession, in satisfaction of a portion of the costs incurred by him in the suit. The wife ought to provide for her costs out of the fund. He also asked the Court to make her contribute £200 towards the costs she had put her husband to by her vexatious opposition to his petition.

THE JUDGE ORDINARY: Is the wife entitled to any other property besides the property you ask me to settle?

Dr. Tristram: No.

Mr. Serjeant Tindal Atkinson, contra.

THE JUDGE ORDINARY: I very well recollect the circumstances of this case. It is one in which, from the facts proved at the trial, the husband is entitled to the sympathy of the Court; and if the property to which the respondent is now entitled were larger in amount, or if it were shown that she had other means of subsistence, I should have made an order in favour of the husband. But it was the rule of the House of Lords not to pass a Bill for divorce until the husband had made some provision for the wife. I don't think, therefore, I ought to deprive the respondent of any portion of this fund, which is all she will have to live upon.

Motion rejected.

SQUIRES v. SQUIRES.

Cruelty.—Pleading.—Evidence.

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SQUIRES
v.
SQUIRES.

A petition alleged that the respondent had, by neglecting the petitioner, by violently pushing her, by striking her with his fist, by depriving her of food, and otherwise, treated her with great cruelty. There was no appearance.

The Court refused to admit evidence under this allegation, in support of the charge of cruelty, that the respondent had infected the petitioner with venereal disease.

This was a petition by a wife for a dissolution of marriage on the ground of adultery coupled with cruelty. The respondent had not appeared. The cause came on for trial before the Judge Ordinary without a jury.

Dr. Spinks for the petitioner.

The only charge of cruelty in the petition was contained in the 4th paragraph, which was as follows:—"4th. That on "divers occasions, during the said seven weeks of their cohabitation, the said Charles Squires, by neglecting her, by violently pushing her, by striking her with his fist, by depriving "her of food, and otherwise, treated your petitioner with "great cruelty."

Dr. Spinks put some questions to one of the witnesses examined in support of the petition, for the purpose of proving that the respondent had infected the petitioner with the venereal disease.

THE JUDGE ORDINARY : There is no charge in the petition of cruelty of that nature.

Dr. Spinks : The evidence is admissible under the general

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charge, "and otherwise treated your petitioner with great "cruelty." If the respondent had appeared and asked for particulars of that charge, they would have been ordered, and then evidence of this act of cruelty would not have been admitted unless it had been specified in the particulars; but no particulars having been asked for, the Court ought not to exclude the evidence. The object of inserting a general charge is to enable the party to give evidence of acts not specified in the petition.

THE JUDGE ORDINARY: I quite agree that words such as these are inserted in petitions for the purpose of allowing a certain flexibility in the admission of evidence as to small details which cannot be expected to be found in the petition, and cannot reasonably be supposed to have been present to the mind of the person who drew the petition at the time when it was prepared. But this is a plain and distinct act of cruelty, which must have been known to the petitioner when the petition was drawn. If this was admissible, any evidence would be admissible under a general charge. I reject the evidence.

The evidence as to other acts of cruelty was sufficient, and a decree *nisi* was pronounced.

June 28 and
July 5.

WELLS v. WELLS AND HUDSON.

WELLS
v.

*Wife Guilty of Adultery.—Alimony pendente lite.—Verdict.
Decree nisi.*

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Alimony pendente lite ceases when the wife's adultery is conclusively proved; that is, on the pronouncing of the decree *nisi* in cases heard

Done - Done 13 20 91

before the Court itself, or in cases tried before a jury, when the time has elapsed for moving for a new trial before the Court; and if that is refused by the Court, when the further time for appealing from such refusal has elapsed.

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In this case, on the 16th of March, 1864, a decree *nisi* for dissolution of marriage, on the ground of the wife's adultery, had been pronounced. Alimony *pendente lite* had been paid up to the 12th of March.

Dr. Tristram moved for an attachment against the husband for non-payment of alimony *pendente lite* since the 12th of March. The question is whether alimony *pendente lite* ceases to be payable after a decree *nisi* has been pronounced. He submitted that it continued until the decree is made absolute, for until then there is a *lis pendens*. In *Latham v. Latham and Gethin*, 2 Swab. and Tris. 298, Sir C. Cresswell certainly held that it ceased when the decree *nisi* was pronounced, upon the ground that such decree as between the parties was final, but it would seem from what he said in *Laxton v. Laxton*, 30 L. J. 208, that he afterwards doubted the correctness of that decision. If alimony *pendente lite* ceases when the decree *nisi* is pronounced, the wife may be left for a long time destitute, as the Court has no power, until it is made absolute, to make any provision for her.

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[*Mr. G. H. Cooper*, *amicus curiæ*, referred to *Nicholson v. Nicholson and Ratcliffe*, 8 Swab. & Tris. 214. In that case, after a verdict finding a wife guilty of adultery, a decree *nisi* was pronounced. A new trial was subsequently granted, and Sir C. Cresswell said that no fresh application for alimony *pendente lite* was necessary, but that it would continue to be payable.]

The Queen's Advocate (Sir R. J. Phillimore) and *Dr. Spinks*, *contrà*: There is no precedent or principle upon which it can be

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held that after a decree *nisi* has been pronounced on the ground of the wife's adultery, alimony *pendente lite* continues to be payable. *Latham v. Latham* is a distinct authority to the contrary, and is not inconsistent with *Nicholson v. Nicholson*, for there the effect of granting a new trial was to rescind the decree *nisi* and put the parties in the same position as if no decree had been made. The suit therefore continued, and whilst it continued it was reasonable that alimony *pendente lite* should be payable. [THE JUDGE ORDINARY : It is difficult to reconcile that case with *Latham v. Latham*, for if alimony *pendente lite* had ceased to be payable on the decree *nisi* being pronounced, how could it revive without a fresh order for its payment? Sir C. Cresswell, however, held that no fresh order was necessary.] Upon principle, when a wife has been pronounced guilty of adultery, her right to be maintained by her husband, and therefore to alimony *pendente lite*, ceases. In *Holt v. Holt*, a husband, who had obtained a sentence of divorce *à mensâ et thoro* on the ground of his wife's adultery, petitioned for a dissolution of his marriage. Sir C. Cresswell held that the wife was not entitled to alimony *pendente lite*, upon the ground that after the sentence of the Ecclesiastical Court her husband could no longer be compelled to support her. In the Ecclesiastical Court, alimony *pendente lite* continued to be payable after appeal and until final sentence was pronounced, the effect of the appeal being to put the sentence in abeyance.

Dr. Tristram, in reply : In *Stoate v. Stoate*, 30 L. J. 108, a wife had had permanent alimony allotted in a suit by her for judicial separation. The husband afterwards obtained a decree *nisi* for dissolution of the marriage on the ground of her adultery. Sir C. Cresswell refused to discharge the order for the payment of permanent alimony, and ordered the motion to stand over until the decree *nisi* should be made absolute or be reversed. In *D'Oyley v. D'Oyley and Baldri*, 29 L. J.

163, alimony *pendente lite* was allotted after a verdict finding the wife guilty of adultery.

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THE JUDGE ORDINARY: The cases referred to do not seem consistent, and I must take time to consider the matter: the title of the husband to relief is a different thing from the ascertainment of the wife's guilt. In cases tried by a jury, I should say that the question as to the fact of adultery is closed not when the jury have found a verdict, but when the time for moving for a new trial has elapsed. *Cur. adv. vult.*

THE JUDGE ORDINARY: This case has raised for final settlement a point of practice which gave rise to several decisions by my most able predecessor. These decisions were hardly uniform or satisfactory to his own mind; and had the question been presented to him in all its bearings as a general one, it would no doubt have received a full and satisfactory solution before now.

July 5.

When it comes to be seriously considered, I think it is manifest that the difficulties which have been urged in argument are entirely based on conclusions too closely drawn from the name of the thing. "*Alimony pendente lite*" is the allowance to the wife which the Court enforces from the husband during the time that their respective rights are in contest in the Court. But it does not necessarily follow, that such allowances should in all cases continue so long as any portion of what is technically called the suit is pending. For it is a principle in this and other courts, that so soon as a wife shall have been false to her marriage vow, she loses the right she had to her husband's support. Keeping this principle in view, it would be nothing less than making the name of the thing paramount to its substance, if the Court were to hold that after adultery proved the alimony must still be paid because the "*lis*" continued "*pendens*." I am therefore of opinion that, although other undecided matters in controversy may

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keep the suit alive, the right to alimony perishes on the final conclusion of the wife's guilt.

When the cause is tried before the Court itself, that final conclusion will have been reached when the Court declares its judgment on the facts, for in this Court such judgment is final. And if an appeal carries the case forward, it also carries it into another court competent to allot alimony if it pleases.

On the other hand, when the cause is tried by a jury, the verdict is not final, it is capable of review in this Court, and may be set aside; in such case, therefore, alimony ought to continue until the time for moving for a new trial has passed, and when such motion has been made and failed in the first instance, until the further time for bringing it under the cognisance of the Full Court has also elapsed. But such alimony can only be allowed, if paid or enforced, while the question of a new trial is still open. So that if, as in the present case, no motion for a new trial has been made, the wife cannot afterwards seek its enforcement at a time when the verdict against her has become final. If the practice at common law of suspending judgment until the time of questioning the verdict had elapsed had been followed in this Court, the final determination of the wife's guilt would be coincident with the decree *nisi*; but some convenience to the parties is achieved by the contrary practice in this Court, and I do not propose to alter that practice.

I will only add, that the conclusions at which I have arrived will make it desirable to reconsider the rule which allows a month to the defeated party to move the Court to set the verdict aside, although the time allowed at common law is but four days; and when further rules are framed for the Divorce Court, I think provision may be made for an amendment in this respect.

WILLIAMS v. WILLIAMS.

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July 26.

*Suit by Wife.—Desertion.*WILLIAMS
v.
WILLIAMS.

The facts which constitute desertion, as ground for a decree, vary with the circumstances and mode of life of the married persons. So long as a husband treats his wife as a wife, by maintaining such degree and manner of intercourse as might naturally be expected from a husband of his calling and means, he cannot be said to have deserted her.

This was the wife's petition for dissolution on the ground of adultery and desertion. As to the latter point, it appeared that the petitioner and respondent were both in domestic service, and the nature of the intercourse which was maintained between them is sufficiently shown in the judgment.

The petition was unopposed.

Dr. Spinks conducted the petitioner's case.

Cur. ad. vult. as to the sufficiency of proof of desertion.

THE JUDGE ORDINARY gave the following judgment:—The question in this case is whether the respondent has been guilty of "desertion of his wife without reasonable excuse for two years or upwards."

It is not easy to define "desertion." To desert is to forsake or abandon. But what degree or extent of withdrawal from his wife's society constitutes a forsaking or abandonment of her? This is easily answered in some cases, not so easily in others, for the degree of intercourse which married persons are able to maintain with each other is various. It depends on their walk in life, and is not a little at the mercy of external circumstances. The position of some, and indeed the large majority, admits of that intimate cohabitation which completely fulfils the ends of matrimony. Short of that, all

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degrees of matrimonial intercourse present themselves in the world. To some it is given to meet only at intervals, though of frequent recurrence. It is the lot of others to be separated for years, or to meet only under great restrictions. The fetters imposed by the professions of the Army and Navy, the requirements of commercial enterprise, and the call to foreign lands which so frequently attends all branches of industrial life, make these restrictions often inevitable. But perhaps on no class do they fall so heavily as on those who devote themselves to domestic service for the means of life. And yet matrimony is made for all; and matrimonial intercourse must accommodate itself to the weightier considerations of material life.

From these considerations it is obvious that the test of finding a home for the wife and living with her, is not universally applicable in pronouncing "desertion" by the husband; nor does any other criterion suitable to all cases present itself to the mind of the Court. To neglect opportunities of consorting with a wife is not necessarily to desert her. Indifference, want of proper solicitude, illiberality, denial of reasonable means, and even faithlessness, are not desertion. Desertion seems pointed at a breaking off, more or less completely, of the intercourse which previously existed. Is the husband, then, bound to avail himself of all means at his disposal for increasing the intimacy of this intercourse, on the peril of being pronounced guilty of desertion? Or, on the other hand, is he free from that peril so long as he maintains any intercourse at all? These are the two extremes. The former proposition is easily solved in the negative. It may be doubted whether the latter ought not to be answered in the affirmative. But thus far, at least, the Court may go, and it is enough for the decision of this case: so long as the husband treats his wife as a wife by maintaining such degree and manner of intercourse as might naturally be expected from a husband of his calling and means, he cannot be said to have

deserted her. And this I think the respondent did. He had before marriage adopted the calling of domestic service. Within a few months after marriage, his small stock of money being exhausted, his wife also went into service. In 1849, five years after the marriage, they set up a business in Mount Street. But it failed, and after two or three years we find them both recurring to domestic service for a livelihood. From that time to the present the wife has been continuously in service, and the husband from time to time the same, having no other occupation. For the last ten or eleven years the wife has been in one and the same situation, and during all that time up to July last the husband has been in the habit of visiting her from time to time. When the family with whom she resides are in London, his habit has been to come to the house perhaps once or twice a week, and for the last three, perhaps four, years he has met her regularly (when in London) every Sunday at the house of a mutual friend. Now this is the species of intercourse which might be expected between persons in the position of domestic servants. And to call it desertion, would be in some cases to render the duties of matrimony impossible to persons of that class.

It has been urged that the petitioner's earnings were sufficient to enable them to start in business again, and that she offered so to apply them, but surely the husband was not bound to accept that offer. Nor has the Court the means of investigating the motives of his refusal. He might well hesitate to embark again in business after their former failure, and the home which his wife wished him to provide could only have been maintained by success. It is therefore impossible to refer his rejection of this overture to a determination not to cohabit with his wife. It is also urged that since the autumn of 1861 he is proved to have cohabited with another woman. If this had withdrawn him from his wife's society, it would have constituted a case of "adultery coupled with desertion." But the contrary is the case, and the evidence

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WILLIAMS

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1864. shows that he continued to visit his wife as frequently as
 July 26. before.

WILLIAMS The Court is therefore bound to declare that the respondent
 v. is not proved to have deserted his wife without reasonable
 WILLIAMS. cause; but as the adultery is clearly proved against him, the
 petitioner is entitled to a decree for a judicial separation.

July 2 and 26.

M— (falsely called B—) v. B.

M—
 (falsely called
 B—)
 v.
 B—.

*Petition for Nullity.—Impotence.—Lapse of Time and
 Indirect Motives.*

M. married B. in August, 1853, and slept in the same bed with him for about two years, when, at his request, she occupied a separate room, but lived in his house till June, 1863, when she left it, and in the early part of the present year petitioned for a decree of nullity, by reason of B.'s impotence. The medical evidence showed her to be a virgin. B. did not submit himself to inspection; but the Court held that the lapse of time, coupled with indirect motives in bringing the suit (mentioned in the judgment), disentitled the petitioner to the relief sought.

This was the woman's petition for a declaration of nullity of marriage by reason of the man's impotency.

The respondent had not appeared nor submitted himself to medical inspection.

Dr. Deane, Q.C., and Dr. Spinks conducted the petitioner's case.

The medical certificate as to the petitioner's condition was as follows:—

“London, May 10, 1864.

“We, the undersigned, testify that we have this day in-

"spected the parts of generation of M. A. M. (otherwise B.), 1864.
 "and we find that there is no malformation nor impediment July 2 and 26.
 "on her part to prevent the consummation of the marriage;
 "that there is a hymen, and that we believe the said M. (falsely called
 " (otherwise B.) to be a virgin. B—)

" (Signed)

ARTHUR FARRE,

" ROBERT GREENHALGH."

The evidence of the petitioner was, by order of the Court, given on affidavit to the following effect:—

"The marriage took place on the 18th of August, in the
 "year 1853, the petitioner being about twenty-nine years of
 "age, the respondent two or three years older. On the night
 "of the said 18th day of August, 1853, the said R. B. made
 "an attempt to consummate the said marriage by carnal co-
 "pulation, but was altogether unable to do so, and after
 "making such attempt, he said in a distressed and despond-
 "ing tone, 'M. A., I think our marriage cannot be consum-
 "mated to-night; there are certain feelings and passions
 "'which people ought to have when they are married, which
 "'I confess I have not,' or words to that effect, and he imme-
 "diately added, apparently in great sorrow, 'My whole life
 "'shall be devoted to you, and if you wish, I will submit to
 "'the examination of a medical man.' But this I did not like
 "the idea of, and therefore did not press him to do so, not at
 "all understanding the matter myself, and hoping and feeling
 "assured that in the course of time all would come right. He
 "also at the same time, as expressive of his sorrow for my
 "position, said several times, 'Poor M. A., I am very sorry
 "'for you,' or words to a similar effect. From the day of
 "the marriage till the 2nd of June, 1863, when I finally left his
 "house, I continued to live with the said R. B., and during
 "the first two years, or thereabouts, I regularly slept with
 "him, and have always been willing and anxious to receive his
 "conjugal embraces, but notwithstanding such my desire,
 "since the said 18th of August, 1853, the said R. B. has never

1864. "made any attempt, or exhibited any inclination, or shown
July 2 and 26. "any disposition to consummate the marriage; but, on the
M— "contrary, has exhibited coldness and indifference towards
(falsely called B—) "me, and that the same has never been in any way consum-
v. "mated. About two years after our marriage, the said R. B.
B—. "expressed a wish that we should occupy separate sleeping
"apartments, alleging as a reason that I kept him awake by
"my loud snoring and other similar excuses. I was desirous
"of continuing to sleep, or at all events to occupy the same
"room with him, if only for the sake of appearances; but he
"persisted in his desire of occupying separate rooms, and we
"have since done so even when visiting at the houses of my
"brother-in-law, which were the only places we have visited.
"Instead of the said R. B. devoting his whole life to me, as
"promised by him, he has for the most part behaved with the
"greatest coldness and indifference, and has given his time
"and bestowed his attention upon any friends of his that
"might be staying with us in preference to me; but this, his
"unkind and unnatural treatment, I have borne with, and
"have not left him out of consideration for his character
"and position as a clergyman, until he latterly, contrary to
"my expressed wish, introduced into the house a servant boy
"we had in the garden, and had him in the drawingroom with
"him during a great portion of his evenings, and, indeed,
"spent most of his time with him, alleging, on my remonstra-
"ting with him, that he was giving him instruction with a
"view to his being some day a Scripture reader, when, feeling
"acutely his conduct towards me, and the indignity thus cast
"upon me, he refusing to put the boy out of the house again
"into his proper place in the garden, and feeling also the great
"wrong he had done me in marrying me at all, I could not
"remain any longer with him, and accordingly on the 2nd day
"of June, 1863, I separated from him. Upon leaving I went
"to the house of my brother-in-law, the said R. H., and have
"continued to reside there ever since; but, in the month

"of February last, on the occasion of my paying a visit of 1864.
 "a week or so at the house of a friend residing close to Not- July 2 and 26.
 "tingham, I heard that divers reports were circulated relative M—
 "to my leaving, to the effect that it was owing to my violent (falsely called
 "temper, and that I was mad and not fit to live in the B—)
 "house, and other things of a similarly annoying nature, v.
 "which reports were very distressing to me, knowing them B—.
 "to be altogether untrue; and I thereupon consulted with
 "my friends as to the course I should adopt, and was strongly
 "advised by them to take legal advice, and to endeavour,
 "if possible, to obtain a dissolution of my marriage, where-
 "upon I consulted my solicitor, Mr. Butlin, of Nottingham,
 "who suggested that before anything was done, the opinion
 "of counsel should be taken as to whether the circumstances
 "of my case would warrant my petitioning this Honourable
 "Court for a decree to dissolve my marriage, and I in-
 "structed him to take such opinion. Whereupon he laid my
 "case before counsel for his opinion, which was favourable
 "to my petitioning for a declaration of nullity of marriage,
 "and I say that until I read that opinion, I was not aware
 "that the circumstances entitled me to such a decree."

Dr. Farre being called as a witness, said that the expression of belief in the certificate was his mode of stating his opinion, about which he had no doubt in the present instance.

THE JUDGE ORDINARY then called counsel's attention to the latter part of the petitioner's affidavit, which suggested other reasons than a mere feeling of the injury sustained by reason of the man's impotency, and to the lapse of time since the remedy accrued, adding, that it could not listen to the suggestion that the petitioner was ignorant of the remedy. Would counsel leave the case as it was, or had they further evidence to offer? Some of the circumstances in *H. v. C.* (1 Swab. & Trist. 605, affirmed on appeal to the House of Lords)

1864. are different. The impotency was not so conclusively
 July 2 and 26. proved. There had been no application for a monition on the
 M— respondent to submit to inspection, and the parties had
 (falsely called B—) been separated for a much longer time before the suit was
 v. brought.
 B—.

Dr. Deane : Delay has not generally been pressed against the woman as against the man in such cases. *H— v. C—* is the only case, as far as we know, in which the delay was held to disentitle a woman to the remedy ; indeed, if the Court is satisfied that the marriage is really null and void—a mere ceremony—it is not easy to see how it can go into such considerations, though no doubt such was the course taken in *H— v. C—*.

The brother-in-law of the petitioner, at whose house she had been staying, was then called.—He said that the petitioner came to his house in June, 1863, to live there ; that he was aware of the reasons she had for leaving her husband when she came, but she did not ask his advice as to her course of conduct till the early part of this year ; that the petitioner's father and mother had both been dead for more than five years or thereabouts.

In answer to the Court.—I first knew of this matter about the year 1860, soon after my own marriage, from my wife. Mr. B. never came to my house to see his wife after she came there in 1863. I was on good terms with Mr. B. till she came to my house, then I rather took her part. She complained that this boy supplanted her almost in every way. Early this year reports were spread about the neighbourhood that she was mad, and that her husband could not live with her. On her own account and that of my family, I thought it advisable that these proceedings should be taken. I should say that the petitioner and respondent had been on terms of coldness, but not on uncourteous terms, before the question about this boy. No medical man attended the petitioner

after she came to my house. She was in good health, and has remained so. She is about forty.

1864.

July 2 and 26.

Our. adv. vult.

M—
(falsely called
B—)
v.
B—.

THE JUDGE ORDINARY gave the following judgment: This is a suit of nullity of marriage, promoted by the wife on the ground of the husband's impotence.

It has been decided in cases of this sort that the Court will not grant relief, unless the petitioner seeks that relief with a certain promptitude, and under the real pressure of the grievance upon which the suit is founded, to the exclusion of any collateral object. It is unnecessary to enumerate the decisions in which these principles are found; they prevailed in the Ecclesiastical Court, have been acted upon by this Court, and were directly affirmed by the appellate tribunal in the late case of *Castleden v. Castleden*, 9 House of Lords Cases. The Court is therefore bound by them, and it only remains to consider how far this case falls within them.

The marriage took place on the 28th of August, 1853, and the parties lived together from that time continuously until the summer of 1863. During this ten years no complaint was made and no step taken, but at the end of that period the petitioner left her husband's house in consequence of a disagreement between them in reference to a servant boy who had been employed in the garden, and whom the respondent insisted upon bringing into the house and instructing. The petitioner complained that he spent too much time with this boy, but the remonstrance being disregarded, she left the house on the 2nd of June, 1863, and proceeded to that of her brother-in-law. This gentleman was called as a witness, and stated that she did not on her arrival complain of the grievance on which this suit is founded, and of which he had been aware as long ago as 1860, but only of the respondent's conduct in reference to the servant boy. He further stated that at that time no advice was asked or offered as to

1863. proceeding in this Court, nor was the matter suggested or
 July 2 and 26. considered between them. So far from this, both the peti-
 M— tioner herself and the witness agreed that the suit was not
 (falsely called thought of until the month of February or March in this
 B—) year, and then only by reason of reports which were circulated
 v. that the petitioner had been obliged to leave her home be-
 B— cause she was mad. "It was to silence these reports," said
 the witness, "that I recommended this suit."

This state of facts, in my opinion, brings the case within
 the *dictum* of Lord Campbell, in the House of Lords: "Ac-
 cording to the Cases, lapse of time, coupled with an indirect
 motive, is considered of itself an absolute bar" (9 H. of L.
 Cas. 191). I feel therefore constrained to dismiss this pe-
 tition.

CASES

IN THE

COURT OF PROBATE.

HANCOCK *v.* LIGHTFOOT.

1864.
July 14.

Administration de bonis non.—Grant to one of two Administrators to represent a Trust Estate.

HANCOCK
v.
LIGHTFOOT.

D. H., executor and universal legatee of J. H., died, having proved the Will, intestate. Administration of her effects was granted to her three children, one of whom had since died, and the other, E. L., was in Australia. A representation to J. H. was required for the purpose of surrendering a term of a certain property, of which he had been a trustee.

The Court, on E. L. being cited and not appearing, granted administration to F. H. (her co-administrator) of the effects of J. H., with his Will annexed.

John Hancock died, leaving a will, dated the 19th of September, 1843, wherein he named his wife, Deborah Hancock, sole executrix and universal legatee.

On January 20, 1844, probate was granted by the Prerogative Court of Canterbury to Deborah Hancock as executrix, who died, in May, 1845, intestate.

On the 12th of August, 1845, letters of administration of her effects were granted to her three children, Mrs. E. Lightfoot (wife of C. Lightfoot), Miss F. Hancock, and William

1864.
July 14.
HANKOCK
v.
LIGHTFOOT.

Hancock (since deceased). Mrs. Lightfoot was now permanently settled in Australia. All the property in which the deceased John Hancock was beneficially interested had been administered; but at the time of his death, as trustee for a Mrs. Randall and her children, he was entitled to certain leasehold property, situate at Devonport, held for a term of years determinable upon lives, and perpetually renewable. A renewal of the lease had become necessary, and in order to obtain it the surrender of the existing term by the personal representative of John Hancock was requisite.

On the 26th of May, 1862, after the death of W. Hancock, a citation was extracted by Miss F. Hancock, calling upon her sister, Mrs. Lightfoot, to enter an appearance, and to accept or refuse letters of administration, with the will annexed, of the unadministered effects of the deceased John Hancock, or to show cause why such letters of administration should not be granted to her, F. Hancock, alone. An abstract of this citation had been advertised in three London newspapers, but no appearance had been entered by or on behalf of Mrs. Lightfoot.

Dr. Spinks moved the Court to decree that letters of administration, with the will annexed, of the unadministered effects of the said John Hancock should be granted to Miss Hancock.

[SIR J. P. WILDE: When a joint administration is granted to two persons, they together make but one administrator. Can one of them act without the other? Would not the proper course be for Miss Hancock to renounce, and then that administration should be granted to the *cestui que trust*?]

Dr. Spinks: In a case cited in Coote's 'Probate Practice' (4th edit.), p. 80, *In the Goods of Crook*, Sir John Dodson decreed that letters of administration should be granted to one of three administrators without notice being given to the

others, one of them being lunatic, and the other resident abroad.

1864.

July 14.

HANCOCK
r.
LIGHTFOOT.

SIR J. P. WILDE: Upon that authority, I think administration may be granted in the form in which it is asked, namely, to Miss Hancock alone. *Motion granted.*

In the Goods of WILLIAM ALLEN (deceased).

November 3.

Administration.—Grant to Party without Interest.—Grant per saltum refused.

In the Goods of
WILLIAM
ALLEN.

A. died in 1831, an infant, leaving his father, B., the only person entitled to his estate. B. died, leaving a Will, in which he named his wife, C., and D., executors, and C. universal legatee. B.'s Will had never been proved. C. died, leaving a Will, in which she named executors, and all her children, excepting E., residuary legatees. D. renounced probate of B.'s Will, and the executors and residuary legatees of C. renounced their right to administer to A.'s estate, and consented to the administration going to E.

The Court held it could not make the grant to E. unless he first represented B.

William Allen died on the 1st of December, 1831, an infant, leaving Charles Allen, his father, him surviving. Charles Allen died on the 11th of April, 1839, without having taken out administration to the said William Allen, leaving a will, of which he appointed his wife, Elizabeth Allen, and C. Smith, executors, and his said wife universal legatee. This will had never been proved. Elizabeth Allen died in 1862, leaving a will appointing executors, and bequeathing her residuary estate amongst all her children, with the exception of her eldest son,

1864. C. H. Allen. C. Smith had renounced his right to probate
November 3. of the will of Charles Allen; and the executors of the will
In the Goods of of Mrs. Elizabeth Allen, and all her younger children as
WILLIAM residuary legatees, had filed renunciations of their right to
ALLEN. administer to the estate of William Allen, and consents to
administration of her estate being granted to their eldest
brother, C. H. Allen.

Dr. Tristram moved for administration of the effects of William Allen to be granted to C. H. Allen. It was true that C. H. Allen took no interest in the estate of his brother, William Allen; but all the parties who took an interest in it having renounced, and consented to the grant going to him, his want of interest was no objection (*In the Goods of George Johnson*, 2 Swab. & Trist. 595).

SIR J. P. WILDE: He should represent his father, Charles Allen, before he can ask for a grant.

Dr. Tristram: He is not in a position to represent him. The executors, and after them the residuary legatees, of Mrs. Elizabeth Allen, would be proper parties to represent Charles Allen. They have not done so, and have not renounced their right to do so, and he cannot compel them. They are willing to allow him to represent William Allen.

SIR J. P. WILDE: I cannot make the grant to C. H. Allen *per saltum*. If he is not entitled to, or cannot entitle himself to represent Charles Allen, he cannot take the grant to the deceased.

1864.

November 3.

In the Goods of ELIZA SMITH (deceased).

In the Goods of
ELIZA SMITH.*Will.—Bequest of Residue.—Construction.*

A testatrix, by her Codicil, bequeathed to A. "her wardrobe, trinkets, and other things."

Held, upon the construction of the Will and Codicil, that this bequest did not pass the residue.

Eliza Smith, spinster, died on the 30th of September, 1864, having duly executed a will, dated July 16, 1864, and a codicil, dated August 1, 1864. The will, so far as is material, was as follows:—

"This is to certify that I, Elizabeth Smith, on this 16th day of July, 1864, bequeath to John Townsend Smith, of 12, Down Street, Piccadilly, the sum of £50 Bank Stock in the new £3 per cents., out of which sum my funeral expenses are to be paid; also, to Mrs. David Smith the jet shawl-pin; also, to my cousin, Mary Warner Smith, a brooch — 'The descent from the cross'—and pearl ring . . . and to Eliza Catherine Smith everything else, viz. my gold watch, dressing-case, clothes, trinkets, as a token of gratitude to her for her unwearied kindness and sympathy shown to me during my long illness."

The codicil was as follows:—"Circumstances having taken a turn, the money remains to John as before; my wardrobe, trinkets, and other things, to my aunt. In the event of her decease before mine, then all my effects to her two daughters, Eliza Catherine Smith and Mary Warner Smith."

Dr. Spinks moved for letters of administration, with the will and codicil annexed, to Mrs. C. Smith, the aunt of the testatrix named in the codicil, as residuary legatee.

SIR J. P. WILDE: A residuary bequest ought to show an

1864. intention to bequeath all the personal property to which the
 November 8. testator may be entitled, which has not been already disposed
 In the Goods of of by the will. From the way in which the testatrix in the
 ELIZA SMITH. will and codicil has used similar expressions, viz. "everything
 "else and all my effects," I cannot come to the conclusion
 that by the bequest of "other things" she intended to pass
 the residue. I cannot grant the motion.

November 8.

In the Goods of THOMAS TOOMY (deceased).

In the Goods of
 THOMAS
 TOOMY.

*Will.—Delivery of Fund in Testator's Life.—Payment of Debt
 out of Fund.—Executor according to Tenor.*

A direction to a person to pay debts or funeral expenses, not out of the
 general estate, but out of a particular fund, will not constitute him
 executor, according to the tenor.

SEMPLE, when a testator, in his lifetime, hands over to a person a sum
 of money, and directs him (out of it) to pay the expenses consequent
 on his sickness, and, in case of death, his funeral expenses, such
 money does not pass under the Will.

Thomas Toomy, on the 18th of July, 1864, made his will
 in the following words:—

"Memorandum, July 18, 1864.

"I have this day handed over to my friend, Mr. William
 "Winn, a one hundred pound draft, and nine pounds in gold
 "—in all one hundred and nine pounds—being all I possess,
 "either real or personal property. Being sick and in some
 "danger of death, I will and devise that the said Mr. Winn
 "do take control of the said sum, pay all expenses consequent
 "on my sickness, and in case of death, funeral expenses; after
 "which the residue, if any, be handed to the Very Rev. Canon

*done
 7/20 1864*

"Browne, Catholic Church of St. Ann's, Leeds, to be used at 1864.
 "his discretion for the benefit of my relations. November 8.

"Testator, THOMAS TOOMY.

"Signed by the testator and two witnesses, in the presence of each other, this date, July 18, 1864. In the Goods of THOMAS TOOMY.

"Witnesses { William Machin,
 Lewis M. Shore."

The testator died on the 20th of July.

William Winn, in pursuance of the above direction, paid the debts incurred by the testator's illness and his funeral expenses.

Dr. Wambey moved for a grant of probate to William Winn as executor according to the tenor. Although the testator handed over the money to Winn in his lifetime, he must have intended that he should not make the payments out of it until after his death, and must have considered it as remaining his own money until his death.

SIR J. P. WILDE: The grant cannot be made. First, I very much doubt whether, as the whole of the property mentioned in the memorandum was dealt with and handed over to Winn by the deceased in his lifetime, it can be said to pass under this paper. Secondly, according to the practice of the Court, a direction to a person to pay debts or funeral expenses, not out of the general estate, but only out of a particular fund, does not constitute him an executor according to the tenor (*In the Goods of Giles Davis*, 3 Curt. 748). The mere fact of the testator's saying that the sum of money out of which the debts and funeral expenses were to be paid was all the property he possessed, is not sufficient to make it a payment out of the general estate; for it might turn out that he was entitled to other property, at the time unknown to him or in reversion.

Motion rejected.

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DOWNWARD

v.

DICKINSON
AND OTHERS.
In the Goods of
CHUNE.

DOWNWARD v. DICKINSON AND OTHERS.

In the Goods of JOSEPH CHUNE (deceased).

Administration with Will annexed.—Grant to Assignee in Bankruptcy of Residuary Legatee.—Grant to Assignee in Bankruptcy of a Creditor.

A. died leaving a Will, whereof he appointed B. executor and residuary legatee. B. proved the Will, and afterwards became bankrupt, and subsequently died intestate, leaving part of the estate of A. unadministered. At the time of his bankruptcy B. was a creditor of A. The Court granted administration, with the Will annexed, of the unadministered estate of A. to the assignee in bankruptcy of B. in the character of assignee of a residuary legatee.

SEMPLE, that the assignee would also have been entitled to the grant as assignee in bankruptcy of a creditor of A.

Joseph Chune, late of Coalbrookdale, in the county of Salop, died on the 20th of December, 1857, having made a will, and thereby appointed his brother George Chune and T. M. Luckock executors and residuary legatees in trust, and the said George Chune and his sister Alice Chune residuary legatees. Probate of the will was granted in February, 1860, by the district registrar at Shrewsbury, to the said George Chune, power being reserved to the other executor. Mr. Luckock had since renounced probate and letters of administration with the will annexed, and Alice Chune had renounced letters of administration *de bonis non* with the will annexed. George Chune died on the 1st of October, 1863, a widower and intestate, leaving seven children, together the only persons entitled in distribution to his personal estate and effects. No letters of administration of such effects had been granted. George Chune was, on the 14th of March, 1862, adjudicated a bankrupt, and George Downward, the plaintiff, was appointed assignee of his estate on behalf of his creditors.

A suit had been instituted in Chancery for the administration of Joseph Chune's estate, and, from accounts taken therein, it appeared that the balance of £248. 3s. 4d. was due from the estate of Joseph Chune to George Chune, as executor. Before the chief clerk's certificate had been given, George Chune died. A citation had been issued at the instance of the said George Downward, calling upon the children of George Chune to accept or refuse letters of administration, with the will annexed, of the unadministered estate and effects of Joseph Chune, or show cause why the same should not be granted to the said George Downward. The citation had been duly served, but no appearance had been entered.

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Dr. Wambey moved the Court to decree letters of administration, with the will annexed, of the unadministered effects of the deceased Joseph Chune, to be granted to the said George Downward, as a creditor of the estate of the deceased. The question is, whether a grant can be made without first getting a representation to George Chune. Such a representation is unnecessary. If A. dies a widower and intestate, and leaving B. his only child, and B. dies a widower and intestate, leaving C. his only child, C. must represent B. before he can get administration to A., for this reason, that the property of B. does not vest in C. until B.'s death. Here the property of George Chune upon his bankruptcy vested in the plaintiff, and his title is in no way dependent upon George Chune's death; indeed, during his lifetime he might, as standing in the shoes of a creditor of the deceased, have obtained the grant now prayed. A representation to George Chune is therefore unnecessary. (Cooke's 'Probate Practice,' pp. 46, 84; see also *Drewe v. Long and Others*, 1 Ecc. & Adm. 391.) The plaintiff has been advised by equity counsel that he has a lien on Joseph Chune's assets for any balance which may be found due to George Chune as executor of Joseph Chune's

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will, or to the plaintiff as assignee of George Chune, and that such right of lien carries with it a right to repayment, and that such rights have precedence and priority over the rights of any other creditor of Joseph Chune, or of any legatee under his will.
Cur. adv. vult.

SIR J. P. WILDE: This was an application for a grant of administration, with the will annexed, of the unadministered effects of Joseph Chune to George Downward as a creditor of the estate of the deceased. Joseph Chune made a will, appointing his brother George Chune an executor and residuary legatee. Upon the death of Joseph Chune, George Chune proved the will, and afterward became bankrupt, and George Downward was appointed his assignee. At the time of his bankruptcy George Chune was undoubtedly a creditor of the deceased; he has since died, and the present application is made by his assignee in bankruptcy. The application was made in the first instance to the registrars in the long vacation, and they referred the matter to the Court. It appears to be the well-founded practice of the Court not to grant administration to the assignee of a creditor. In *Baynes v. Harrison*, Deane R. 15, Sir J. Dodson says:—"It would be a dangerous practice to decree administration of an intestate estate to persons who had brought up a debt after the death of the deceased." Such reasoning is not applicable to the case of the assignee of a creditor where he is assignee in bankruptcy. It is not necessary, however, to consider the difference between the two cases, because George Chune was not only a creditor of the deceased, but also residuary legatee under his will, and in that latter character his assignee is clearly entitled to the grant.

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Nov. 4 and 29.

MOORE v. WHITEHOUSE.

MOORE

v.

WHITEHOUSE.

Will.—Probate of Copy.—Proof.

Where a person, who has himself destroyed a testamentary paper after the death of the alleged testator, asks for probate of the substance thereof, as contained in a copy or otherwise, the Court will expect the fullest and most satisfactory proof of all the facts necessary to be established.

In this case the plaintiff asked for probate of the will of a Mrs. Whitehouse, as contained in an alleged copy thereof, the original having been destroyed under the following circumstances:—The deceased died a widow in the year 1862. By the will in question, bearing date the 30th of January, 1861, Clara Whitehouse, a daughter of the deceased, was made sole executrix and universal legatee. Thomas James Moore, who afterwards married Clara Whitehouse, deposed to having drawn the will at the desire of the deceased, and to its having been duly executed. It was in his possession after the deceased's death, when dissatisfaction was expressed by his brother-in-law and others of the family at the mode in which the property had been left, in consequence of which Moore divided the property as under an intestacy and destroyed the will, having first made a copy thereof.

Circumstances made it advisable to have a personal representative of Mrs. Whitehouse, and the present suit was instituted. The evidence of one of the attesting witnesses fell short of due execution.

Dr. Spinks for the plaintiff.*Cur. adv. vult.*

SIR J. P. WILDE gave the following judgment:—The proof of a will which has been destroyed is at all times a matter to be approached by the Court with jealousy and mistrust. It is

November 29.

1864. doubly so in this case; for the will in question was made by
 Nov. 4 and 29. Thomas James Moore, who was then engaged to be married
 to Clara Whitehouse, the universal legatee under it. This
 MOORE Thomas James Moore became also one of the witnesses to the
 v. will, and was the person who, three months after the death,
 WHITEHOUSE. himself destroyed the will after procuring what he alleges to
 be a copy of it to be taken.

Before such a paper can receive the sanction of the Court, the last trace of reasonable doubt or suspicion must be dispelled by trustworthy evidence. The evidence in this case falls far short of that end. Mary Butler, the only disinterested witness, and who attested the will, distinctly declares that Mrs. Moore asked her to sign a paper; that she did not say what it was; that Mrs. Moore fetched it downstairs, and laid it on a table, and asked her to sign it; that she did so, and that nothing was done before she signed it. If this account is true, there was no due execution of a will according to the statute. Nor does the account of Clara Whitehouse (now Mrs. Moore), who was present, cure the defect. Further, the proof that the paper propounded is a copy of that of which the witnesses are speaking rests on the evidence of the same Thomas Moore.

The Court cannot, after such evidence, pronounce for a paper not in existence, which is to be supported, if at all, by the oath of the sole party interested, and who himself destroyed the original.

December 6.

ROBSON v. ROBSON.

ROBSON
 v.
 ROBSON.

Plaintiff and Defendant.—Security for Costs.—Mode of Trial.

The plaintiff applied for administration to B. on presumption of death:

the defendant appeared in answer to a citation advertised in newspapers, and alleged that he was B.

The Court refused to make any order on the defendant to give security for costs.

SEMBLE, the general rule at common law, that the defendant should not give costs, might not apply in all cases in the Court of Probate where the nominal position of plaintiff or defendant depends on the mode in which the cause commenced.

The Court refused an application on behalf of defendant to order the issue to be tried by a jury, the plaintiff objecting thereto.

This suit was instituted for the purpose of obtaining administration of the estate of George Robson, late of H. M. S. 'Vindictive,' who was alleged not to have been heard of by his family since 1843, and, therefore, was supposed to be dead. In the month of July, 1864, the Court, upon an *ex parte* application made by Cecilia S. Robson, the plaintiff, granted administration to her as an executrix named in the will of James Robson, the father of the said George Robson, who died in 1857. Before the grant under seal was issued from the registry a caveat was entered on behalf of George Robson, the defendant, and on the caveat being warned, an appearance was entered on his behalf as the George Robson alleged to be deceased. A declaration had been filed by the plaintiff, alleging that the said George Robson had died, in or about the year 1843, a bachelor and intestate, to which the defendant pleaded that he did not die in or about the year 1843, or at any other time.

Dr. Spinks moved for directions as to the mode of trial, and also that the defendant be ordered to give security for the costs of the cause, and in default thereof that all contentious business should be stayed. This was a very singular case; there were several circumstances which appeared in the affidavits filed in the previous motion, which show that the defendant is not the man he alleges himself to be; he was in Australia and had authorized solicitors to appear for him,

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1864. and being without the jurisdiction of the Court ought to give
December 6. security for costs. This was a matter within the discretion of
the Court, and there was not the same distinction in this
court between plaintiff and defendant as in courts of Common
Law. The defendant was only nominally defendant, practically he was the plaintiff. The defendant's plea, moreover, should have gone on to allege that he, the defendant, was the George Robson named in the declaration.

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Dr. Tristram, contra: To compel the defendant to give security for costs would be to defeat the object for which the citations were issued and advertised, in cases where application was made for administration of the estates of persons who had not been heard of for some years. In almost every case the person cited, if alive, would be abroad, and it would be a great injustice to him if he were not allowed to come forward and establish the fact of his being alive, and so to secure his right to the property without his giving security for costs. By reason of his inability to give such security he might lose his own money. The circumstances referred to in the affidavits go to the very matter in issue between the parties, and cannot affect this question now raised. Moreover, the defendant here is not only nominally but practically the defendant.

SIR J. P. WILDE: This is a very peculiar case. The plaintiff asks for administration to George Robson said to be dead. The defendant comes here, invited by the citation advertised in the newspapers, and says that the George Robson, of whose estate administration is sought, is not deceased and that he himself is the very man. The plaintiff denies this, and says you must give me security for my costs, or, if you cannot, then an end shall be put to the contentious proceedings. It would be a very great injustice to say that the defendant shall not be allowed to establish his claim unless he can find secu-

urity for costs; for if he is not able to find security and is the right man, he may thereby be deprived of his property. On the other hand, very great inconvenience may be worked to parties who claim administration in these cases, if any one may start up without any title or claim, and put them to the expense of a suit to establish their claim. There is inconvenience both ways, but it seems to me that I cannot call upon this man to give security for costs. In this suit the plaintiff is really the plaintiff, as she is seeking to obtain a sum of money, which she cannot obtain without the assistance of the Court, and the defendant is really the defendant, as he is brought into the court by the citation issued by her. The rule, therefore, of the Common Law Courts, that the defendant, when residing out of the jurisdiction of the Court, shall not be required to give security for costs, is applicable to and ought to govern this case. There is no application on the present motion for ordering the plea to be amended, but I think it ought to be amended by stating that the defendant is the George Robson named in the declaration.

Dr. Tristram, on behalf of the defendant, asked that the issue should be tried by a jury.

Dr. Spinks, contra.

SIR J. P. WILDE: I do not think that this is a case in which, as one of the parties does not wish for it, the Court ought to order a trial by jury; it must be tried by the Court itself.

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December 5.THOMAS
DIXON AND
WILLIAM
DICKENSON

v.

JOHN
ALLINSON AND
MARY HIS
WIFE.In the Estate of
ANN WILSON.THOMAS DIXON AND WILLIAM DICKENSON v. JOHN
ALLINSON AND MARY HIS WIFE.In the Estate of ANN WILSON, Wife of WILLIAM STITT
WILSON (deceased).*Will and Codicil propounded.—Persons proper to be cited.*

The plaintiffs propounded the Will and Codicil of Ann Wilson, under the latter of which her husband, who had survived her but a short time, took an interest.

The Court allowed a citation to issue to the official liquidators of the East of England Bank, creditors of the husband, to see the Codicil proved.

Ann Wilson died at sea on the 3rd of June, 1864, having during coverture, by virtue of certain powers, made her last will, bearing date the 19th of October, 1863, and therein appointed her husband, William Stitt Wilson, and the present plaintiffs, executors. On the 30th of May, 1864, the deceased executed a paper, purporting to be a codicil to her said will, whereby she bequeathed certain railway shares and stock in railway companies to her said husband. William Stitt Wilson died on the 12th of June, 1864, having made his will, and thereby appointed Dixon and Dickenson, the present plaintiffs, executors, and residuary legatees, of which will probate had been granted to Dixon alone. Since Wilson's death, proceedings had been instituted in the Court of Chancery, by the East of England Bank, on behalf of itself and all other creditors of William Stitt Wilson, against the plaintiffs, as his executors, for administration of his real and personal estate, which proceedings were still pending. An order had been made by the Court of Chancery for winding-up the said East of England Bank, and James Boatwright Gibbons and Jacob Henry Tillett had been appointed official liquidators.

A *caveat* had been entered by the defendants against the

proof of the will and codicil of Ann Wilson; hence the present suit.

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And the Court was now moved by *Dr. Spinks*, on behalf of the plaintiffs; for leave to cite Gibbons and Tillett, as representing Wilson's creditors, who were interested in the codicil of Ann Wilson, under which Wilson's estate would be benefited, to see proceedings to the present suit.

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WIFE.
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ANN WILSON.

Dr. Wambey, on behalf of the defendants, made no opposition.

Cur. adv. vult.

SIR J. P. WILDE: In this case the plaintiffs propound the will and codicil of Ann Wilson, wife of William Stitt Wilson, who survived his wife, but is since dead. The executors of the will of the deceased are also executors of the will of the husband. There are certain persons representing the East of England Bank as creditors of the husband; these are official liquidators of the bank; the question is, what interest have they in the matter? They are creditors of the husband, and, as such, interested in supporting the codicil propounded, by which the husband's estate would be benefited; thus, though somewhat circuitously, they have a real and substantial interest. In *Kipping and Barlow v. Ash*, 1 Rob. 270, Sir H. Jenner Fust considered that the bare possibility of an interest was sufficient to enable a person to oppose a testamentary instrument. In the present case I think it is quite proper to cite the official liquidators.

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Nov. 29 and
December 20.

In the Goods of JOSEPH ALLISON (deceased).

In the Goods of *Property in England and Scotland*.—21 & 22 Vict. c. 56.—
JOSEPH
ALLISON. *Goods of Muir, 1 Swab. & Trist. 294, overruled.*

Mackay
1/2 p. x 25 8/10

Under 21 & 22 Vict. c. 56, it is not necessary that the memorandum of English domicile should be in or on the probate at the time it is issued, and where, by a *bond fide* mistake, the probate was taken for property in England only, and it afterwards turned out that there were certain railway shares in Scotland, the Court allowed a supplemental affidavit to be filed, and ordered the memorandum of English domicile to be written on the probate.

In this case the deceased died domiciled in England. For the purposes of probate duty the property was sworn under £90,000. When the residuary accounts were rendered, and a schedule of property annexed, it appeared that there were shares in Scotch railway companies to the value of between £2000 and £3000; and the Inland Revenue insisted on a Scotch probate or a confirmation of the English probate in respect of these shares.

By 21 & 22 Vict. c. 56, sec. 14, it is enacted that, "When any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, shall be produced in the Commissary Court of the county of Edinburgh, and a copy thereof deposited with the commissary clerk of the said court, the commissary clerk shall indorse or write on the back or face of such grant, a certificate in the form, as near as may be, of the schedule (F) hereunto annexed; and such probate or letters of administration being duly stamped shall be of the like force and effect, and have the same operation in Scotland as if a confirmation had been granted by the said Court."

Mr. Searle now moved the Court to direct the memorandum of English domicil to be added to the probate. *In the Goods of James Muir*, 1 Swab. & Trist. 294, Sir C. Cresswell held that such a memorandum must be affixed at the time the probate is granted; but it is submitted that the words of the section are not imperative, and the rule may cause great inconvenience; indeed, it is not clear what meaning can be given to the words "note or memorandum written thereon," unless what is now asked can be done.

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December 20.In the Goods of
JOSEPH
ALLISON.*Cur. adv. vult.*

SIR J. P. WILDE: In this case application has been made to the Court that the proper officer may be allowed to make a note or memorandum on the probate, stating the testator to have been domiciled in England. This has become necessary in consequence of a *bond fide* mistake as to certain shares which now turn out to be "personal estate in Scotland," a mistake which, if not rectified, will deprive the applicant of the benefit intended to be conferred by the statute 21 & 22 Vict. c. 56. The obvious intention of the statute was, that for the purpose of duty, English and Scotch personal estate should be calculated together as one entire sum. But before the commissary in Scotland would be justified in taking the necessary steps to give effect to this probate as a Scotch confirmation, it is requisite that the officer of this Court should have stated in the probate, or "by a note or memorandum "indorsed thereon," that the testator died domiciled in England. The question raised is, whether this can be done after the probate has once been granted. The words "indorsed "thereon," in sect. 14, would seem to have been introduced for this and no other purpose, for if the fact is to be stated when the grant issues there is no conceivable reason for not stating it "therein." It is, however, to be observed, that neither in this section nor in any other is any direct power conferred on this Court in the matter. The section is ad-

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JOSEPH
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dressed directly to the commissary in Scotland, and the power and duties of this Court are spoken of inferentially only. This inference ought, I think, to be drawn with sufficient latitude to achieve the obvious purposes of the legislature. And although the rest of the Act, in speaking of the affidavit as to domicile, has not expressly provided any machinery for the rectification of a mistake such as has occurred in this case, I feel justified in permitting, nay, bound to permit, a supplemental affidavit to be filed, and the proper note on the probate to be made.

March 1 & 18. **PURDEY AND OTHERS v. FIELD AND ANOTHER AND HATCH**
(intervening).

PURDEY AND
OTHERS
v.FIELD AND
ANOTHER
AND HATCH
intervening.

Practice.—Citation of Heir-at-law.—Appointment of Receiver of real Estate.—20 & 21 Vict. c. 77, s. 71.

Before a receiver of real estate will be appointed by the Court, under the 20 & 21 Vict. c. 77, s. 71, it is necessary that it should appear on affidavit, that the heir-at-law, or devisee, or other person having or pretending interest in the real estate, has been cited under the 61st section.

James Purdey, deceased, by a will and codicil, both dated the 29th of October, 1863, and both affecting real as well as personal estate, appointed J. Purdey, W. Trinder, and W. Williamson, executors. Trinder and Williamson propounded the will and codicil; Purdey propounded the will and not the codicil; and the intervener, Martha Hatch, propounded the codicil and not the will. Leave had been obtained by the plaintiffs, Trinder and Williamson, under the 61st section of the 20 & 21 Vict. c. 77, to cite J. Purdey, the other plaintiff, who was the deceased's heir-at-law, to see proceedings in that capacity.

Dr. Wambey, for J. Purdey, moved, under the 71st section of 20 & 21 Vict. c. 77, that G. and J. Rutherford, solicitors, or one of them, might be appointed receivers of the real and leasehold estate of the deceased *pendente lite*. 1864.
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Mr. Searle, for Trinder and Williamson: The application is premature, because no affidavit has been filed, showing that J. Purdey has been cited as heir-at-law. If he has not been so cited, the suit will not affect the real estate of the testator, and, consequently, no receiver can be appointed.

Dr. Wambey: I am instructed that J. Purdey has been cited as heir-at-law.

SIR J. P. WILDE: I must have an affidavit of the fact before I can appoint a receiver.

Dr. Deane, Q.C., for Mrs. Hatch, contended that Trinder and Williamson were the proper persons to nominate the receiver.

SIR J. P. WILDE: I shall not now make any order. When an affidavit has been filed, showing that Purdey has been cited as heir-at-law, the motion may be renewed, if it is thought to be necessary. But as the case will probably be heard in the course of next term, it is worthy of consideration whether there is any necessity for the appointment.

Dr. Wambey renewed the motion upon affidavits that J. Purdey had been cited as heir-at-law, and that the rents had fallen due at Christmas, 1863, and that other rents would be due at Lady Day, 1864, and that it was necessary that the rents should be collected, to pay taxes and other outgoings.

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In the Goods of
MARY ANN
KILLICK.

In the Goods of MARY ANN KILLICK (deceased).

Will.—Execution.—Attestation in Presence of Testator.

A Codicil was signed by a deceased, who was ill in bed in one room, and attested by two witnesses in an opposite room, but who did not see the deceased make or acknowledge her signature, or have any conversation with her respecting it. The deceased, the doors of both the rooms being open, might by raising herself in bed have seen the witnesses sign ; but there was no evidence that she did do so.

HELD, to be a bad execution, on the ground (1) that the deceased did not make or acknowledge her signature in the presence of the witnesses, and (2) that they did not attest in her presence.

The deceased, Mary Ann Killick, died on the 27th of July, 1864, having made a will dated the 24th of January, 1863, by which she appointed B. Beanland sole executor. Subsequently, in the month of February or March, 1864, she signed a paper as a codicil without an attestation clause, but which was signed by H. Kendall and R. Kendall as witnesses.

This paper was signed under the following circumstances. In the month of February or March, 1864, the witnesses were at the house of Mrs. Jackson, with whom the testatrix resided. She was then confined to her bed in a room on the first floor, the door of which opened to a landing, and was directly opposite to the door of a sitting room, in which the witnesses were. Mrs. Jackson told them there was a codicil for them to sign. She then went into the bedroom, and shortly afterwards returned with the codicil, which had been already signed by the testatrix, and placed it on a table near the door of the sitting room. The witnesses then signed it in the presence of each other. The doors of both rooms were open, and the testatrix, from the position of her bed, might by raising herself and inclining her head in the direction of the door, have seen the witnesses sign ; but they neither saw her nor heard her voice. The testatrix did not sign the codicil,

nor acknowledge her signature in the presence of the witnesses, nor had they any conversation with her respecting the codicil. 1864. November 3.

The parties interested had been cited, but had not appeared. In the Goods of MARY ANN KILLICK.

Dr. Wambey, to obtain the opinion of the Court, moved for probate of the codicil. He apprehended the Court would reject the motion, on two grounds; first, that the testatrix neither signed nor acknowledged her signature in the presence of the attesting witnesses; secondly, the attesting witnesses did not sign in the presence of the testatrix. For aught they knew, the testatrix might have been asleep, insane, or dead, when they signed. He cited *Shires v. Glascock*, 2 Salk. 687; *Davy v. Smith*, 3 Ibid. 395. *Casson v. Dade*, 1 Bro. C. C. 99; *Newton v. Clarke*, 2 Curt. 320; and *Tribe v. Tribe*, 1 Robert. 775.

SIR J. P. WILDE: Cases of this description are often very difficult to determine. The Court has every desire to give a reasonable latitude to the exigencies of the statute, which require the execution of the instrument to be of a peculiar character, but it must be borne in mind that as much injustice may be done by pronouncing in favour of a will which has been improperly executed, as against a will which has been properly executed. There is a natural tendency in the mind of the Court to uphold a testamentary document, when it is clear that it was signed by the deceased with the intention of giving it validity; but it cannot uphold it in the face of facts negating a compliance with the statute. The first question here is, whether the witnesses saw the deceased sign or acknowledge her signature to this document in the presence of each other. On this point the evidence is point-blank that they did not see her sign it, for it was signed by her in one room before they were aware of its existence. They were told that there was a paper requiring their signatures, but they

1864. had no conversation with her respecting it, and did not see
November 3. her acknowledge it.

In the Goods of
MARY ANN
KILLICK.

It is unnecessary to go further; but to my mind it is equally plain that the document was not signed by the witnesses in the presence of the deceased. Great latitude ought to be given to the meaning of the word "presence" used in the 9th section of the Wills Act, and I am not disposed to draw a fine distinction between one room and two rooms opening into one another; but I think such an act as this cannot be said to be done by one person in the presence of another, unless at the time each is aware of the other's presence. That was not the case here. Apparently the deceased knew nothing about the witnesses being in the other room. I pronounce against the codicil.

November 4.

VINNICOMBE v. BUTLER AND ANOTHER.

VINNICOMBE
v.
BUTLER AND
ANOTHER.

Will.—Execution.—Evidence of Attesting Witnesses.—Presumption when the Memory is imperfect.

Where a Will appears to be duly executed, and there is a complete attestation clause, the presumption *omnia rite esse acta* applies, and is not rebutted by the defective memory of the attesting witness. Where the attestation clause is incomplete, the presumption also applies, but with less force.

The attestation clause to a Will was informal, and the memory of the attesting witness was defective; but it was proved that the Will was signed by the deceased, and that the witness had been in the room with him for the purpose of attesting it.

The presumption *omnia rite esse acta* was held to prevail, and the Court pronounced for the Will.

Ann Boosey, wife of John Boosey, died on the 10th of April, 1862, leaving two testamentary papers, one dated the

10th of April, 1857, the other without date, which were propounded by the plaintiffs as together containing her last will and testament. The defendants pleaded that the paper writings propounded were not duly executed. The only question was as to the execution of the paper writing of the 10th of April, 1857. It appeared to be made in execution of a power; it was without any attestation clause, and it concluded as follows:—

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ANOTHER.

“Signed and sealed this 10th day of April, 1857.

“ANN BOOSEY.

“Witness this my hand, JOHN HILLS.

“Witness this my hand (L. S.), ANN HILLS.

“Witness this my hand, SARAH POCKOCK.

“Witness this my hand, GEORGE HILLS.”

The cause was heard by Sir J. P. Wilde, without a jury.

The attesting witnesses were examined, and three of them, John Hills, Ann Hills, and George Hills, remembered nothing about the matter. Sarah Pocock, the other attesting witness deposed that, on the 10th of April, 1857, she was asked by the testatrix to sign her will; that the testatrix signed the document in her presence and in that of John Hills, and that she, Sarah Pocock, and John Hills, signed it in the presence of the testatrix, John Hills signing before she (Sarah Pocock) signed. She was not sure whether the testatrix signed before or after, but she thought it was after.

Dr. Middleton and *Mr. Joseph Sharpe* for the plaintiffs. The presumption *omnia rite esse acta* was not rebutted by the failure of the memory of the attesting witnesses. *Burgoyne v. Showler*, 1 Rob. 5; *Gwillim v. Gwillim*, ante, 200.

Dr. Spinks for the defendant. The presumption *omnia rite esse acta* does not arise because, from the appearance of the paper and the evidence, it is to be inferred that the testatrix did not know the requirements of the Wills Act.

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v.

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SIR J. P. WILDE: I agree with Dr. Spinks, that questions of this kind depend upon a number of circumstances peculiar to the case in which they arise, and that the presumption *omnia rite esse acta* applies, with more or less force, according to the circumstances of each case. When there is a regular attestation clause, with the names of two witnesses appended thereto, leading to the conclusion that the will was executed by a person who knew the requirements of the Wills Act, the principle applies directly, and it may be presumed that the will was duly executed, and the mere failure of memory of the witnesses will go for nothing. But where there is an informal attestation clause, such as in the present case, which leads to the conclusion that the testatrix did not know the requirements of the Wills Act, the presumption will not apply with the same force. In every case of this kind the Court should be influenced by a strong desire that the intention of the testator be not frustrated by the lapse of time and failure of the memory of the witnesses. The requirements of the statute are very precise, and when the Court has to deal with witnesses who are not lawyers and men of business, or persons who from their position in life have acquired the habit of jotting down in their minds the precise order of events, it should be very cautious indeed in pronouncing against a will where the signature of the testator is amply proved, and it is also proved that the persons who put their names as witnesses went for the express purpose of signing the paper as a will. Bearing this principle in mind, look at the evidence and see how far it is made out affirmatively that the will was properly executed. Sarah Pocock swears distinctly to her signing her name, and also to John Hills signing his name. She says "John Hills signed, and he signed before me," and his name appears on the paper before hers. John Hills is present, and he signed before her, and as she saw him sign, they were both present when she signed. John Hills says, "My memory is a perfect blank, except that I saw

"Sarah Pocock sign." Therefore two attesting witnesses present at the same time each saw each other sign. John Hills says, "I cannot recollect whether I saw the testatrix sign." Sarah Pocock says, "I saw Mrs. Boosey put her name to the will, and I also think that she put it there after I had signed my name. I am quite sure I saw her put her name, but I cannot be sure whether it was before or after I had signed. Mrs. Boosey said it was her will before we signed." Taking these statements together, they lead very reasonably to the conclusion that she did sign the will in the presence of Sarah Pocock and John Hills. It seems to me, therefore, that both papers are entitled to probate.

1864.
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VINNICOMBE
v.
BUTLER AND
ANOTHER.

Dr. Spinks asked for the costs of all parties out of the estate. The litigation arose from the act of the testatrix.

Sir J. P. WILDE: I think all the costs should be paid out of the estate.

Probate granted. Costs of all parties out of the estate.

In the Goods of ELIZABETH MIDDLETON (deceased).

November 8.

Mutilation of prior Will.—Dependent Relative Revocation.

In the Goods of
ELIZABETH
MIDDLETON.

The testatrix duly executed a Will in 1855, and in 1862 she signed another Will, being a copy of the former one, with the exception of bequests to a niece, but which was not duly attested. In 1864 she cut out the names of the attesting witnesses to the earlier Will, in the presence of a fellow-servant. Both documents were retained in her possession until her death.

Held, that the doctrine of dependent relative revocation applied, and that the Will of 1855 was entitled to probate.

The deceased, Elizabeth Middleton, died on the 16th of

1864. June, 1864. She duly executed a will, dated the 26th of November 8. April, 1855, by which she bequeathed to her niece, A. Sanders, £5 and one fourth of her wearing apparel, and appointed the Rev. W. Clarke and Miss F. Clarke executors.

In the Goods of
ELIZABETH
MIDDLETON.

Subsequently she wished to exclude her niece from taking any benefit under her will, and, having had the will recopied (omitting the legacies to the niece), she, on the 23rd of January, 1863, signed the will so recopied in the presence of two witnesses, one of whom, being unable to write, did not sign or make her mark on the will, but her fellow-witness signed her name for her by her request in the presence of the deceased. About a fortnight before her death the deceased, in the presence of one of her fellow-servants, without making any remark, took the will of 1855 out of a tin box in which she kept her papers, and, having cut out the greater part of the names of the attesting witnesses, directed her fellow-servant to burn the piece of paper so cut out, which she did. The deceased retained both wills in her custody until her death.

Dr. Spinks moved for probate of the will dated the 26th of April, 1855. The execution of the will of the 23rd of January, 1862, is defective, as it was essential to its due execution, that both the witnesses should have signed it. The reasonable presumption is, that the earlier will was mutilated by the deceased under the impression that it was revoked by the later one, but the latter one being invalid the doctrine of dependent relative revocation applies, and probate should be granted to the earlier one. If the mutilation of the earlier will had been contemporaneous with the execution of the later one, or there had been a declaration by the deceased contemporaneous with the mutilation, to the effect that she considered the later will to be valid, there could be no doubt as to the application of the doctrine. The lapse of time between the execution of the later will and the destruction of the earlier one did not take the case out of the rule.

SIR J. P. WILDE: Upon a review of all the facts, I am satisfied that the deceased, by cutting out the signatures of the attesting witnesses to the earlier will, only intended to revoke it on the assumption that the later will had been duly executed. The case therefore falls within the principle of dependent relative revocation frequently acted on in this Court, and explained in *Ex parte the Earl of Ilchester*, 7 Ves. 279-372. Probate of the will of 1855 will therefore be granted.

1864.

November 8.

In the Goods of
ELIZABETH
MIDDLETON.

In the Goods of HANNAH TUCKER (deceased).

November 15.

Administration.—Jurisdiction.—Effects in France and not in England.—Practice of French Courts.

In the Goods of
HANNAH
TUCKER.

Where the deceased died in France, leaving personal estate there, but none in England, and it was alleged, that by the law of France her husband, from whom she had eloped, could not establish his claim to her property there without a grant from this Court,

HELD, that the Court had no jurisdiction to make a limited grant to enable him to substantiate his claim to the property in the Courts of France.

The deceased, Hannah Tucker, died intestate in France in 1864, leaving William Tucker, her husband, her surviving, from whom she had eloped in 1854, and some personal estate in France, but none in England. By the law of France, the husband was unable to establish his claim to her property in France without a grant from this Court.

Dr. Spinks moved for a grant of administration to be made to William Tucker. As the deceased had left no property within the jurisdiction of this Court, it was contrary to its practice to make a general grant of administration. He submitted, however, that the Court, under the circumstances,

Case 1
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1864. might decree a grant to the husband, limited to the purpose
 November 15. of substantiating in the Courts of France his title to the pro-
 In the Goods of perty. In the *Goods of Charles Turner, ante, 476*, the de-
 HANNAH ceased, if he had survived M. Turner, would have been en-
 TUCKER. titled to a fund in Chancery. He had no other property.
 The Court being of opinion that this fund had never vested
 in him, declined to make a general grant, but decreed a grant
 of administration limited *ad litem* to enable the applicant
 to appear and substantiate proceedings in Chancery.

SIR J. P. WILDE: That case only decides, that, where it is
 doubtful whether a deceased was or was not entitled to per-
 sonal property in this country, the Court would make a grant
ad litem, in order that it might be ascertained whether he was
 or was not so entitled. In that case there was a possibility
 that the deceased had property in England, here she has none.
 It is not one of the functions of this Court to determine as an
 abstract question who is the proper representative of a de-
 ceased person, and if the Courts of France insist upon such a
 declaration they are very unreasonable. The foundation of
 the jurisdiction of this Court is, that there is personal pro-
 perty of the deceased to be distributed within its jurisdiction.
 In this case, the deceased had no property within this country,
 and the Court has therefore no jurisdiction. I reject the
 motion.

December 6.

In the Goods of THOMAS ENGLISH (deceased).

In the Goods of
 THOMAS
 ENGLISH.

Will.—Parol evidence that a document is testamentary.

The intention of a testator, that a duly executed paper-writing should
 operate as a Will, may be proved by parol evidence.

Thomas English died on the 12th of March a bachelor,
 without any known relation.

Whitman - bank
 28.7.43

On the 10th of March, 1864, a document, in the following terms, was duly executed by him according to the provisions of 1 Vict. c. 26 :—"I, Thomas English, tailor, give Dennis Newcombe, chandler, full authority to draw the amount of "money, with interest, contained in my bank-book."

1864.

December 6.

In the Goods of
THOMAS
ENGLISH.

The usual citation had been extracted and advertised by the said Dennis Newcombe, who was a creditor of the deceased, and had been served on the Queen's Proctor, calling on the next of kin, if any, and all other persons in general, to accept or refuse letters of administration with the will annexed, or to show cause why it should not be granted to him. No appearance had been entered to such citation.

Dr. Wambey moved for a grant of administration of the estate and effects of the deceased, with this paper writing annexed, as being his last will and testament to Dennis Newcombe as a creditor. The testamentary character of a paper writing can be proved by parol evidence: *The King's Proctor v. Daines*, 3 Hagg. 220; *Jones v. Nicolay*, 2 Rob. 292; *In the Goods of Marsden*, 1 Swab. & Trist. 542. It was proved by the affidavit of William Cooper, one of the attesting witnesses, that on the 10th of March, 1864, he was sent for by the deceased, who said that he wanted him to write out a paper to make the Newcombes all right, so that they could draw the money in the bank if anything should happen to him, and that he had given them the bank-book. The document was accordingly written by the witness from the dictation of the deceased, and was then duly executed. He understood at the time, and still believed, that the deceased intended the document to take effect as his will in case of his death. The only property of the deceased was a sum of £53. 9s. 2d. in the Halifax Mechanics' Institution Penny Savings-Bank.

SIR J. P. WILDE: The cases cited show that, in order

1864. to ascertain whether a paper writing is of a testamentary character, the Court may admit parol evidence. The evidence
 December 6. satisfies me that the deceased intended the document to take
 In the Goods of effect as his will. It does not appear upon affidavit when the
 THOMAS debt of Dennis Newcombe became due. When that omission
 ENGLISH. has been supplied letters of administration, with the will annexed, may be granted to Dennis Newcombe as a creditor.

Motion granted.

OWEN v. DAVIES.

November 8.

Pleading.—Not the Will of the Deceased.—Practice.

OWEN
 v.
 DAVIES.

The plea that the Will propounded is not the Will of the deceased, is too vague and indefinite, and in future, therefore, will not be allowed to be pleaded.

Dr. Spinks moved for directions as to the mode of trial. The defendant had pleaded several pleas; the first being that the will propounded was not the will of the deceased.

SIR J. P. WILDE: The plea that the will propounded is not the will of the deceased has become a very favourite plea, and it is time that the Court should take notice of it. If it means that the deceased did not intend the paper which he signed to operate as a will, but executed it as a sham for some collateral purpose, that meaning ought to be put in plainer language. If it means that he signed the will not knowing it to be his will, that should be stated, or if the plea has any other meaning, it ought to be precisely stated, in order that the Court may know the question that is to be tried. In its present form, it comprehends every plea which can be pleaded in opposition to a will. I shall in future not give directions

for the mode of trial of any case in which this plea has been pleaded, until it has been struck out. The plea must be struck out, with liberty to the defendant to apply for leave to add any further plea that may be applicable to the circumstances of the case.

1864.

November 3.

OWEN

v.

DAVIES.

In the Goods of ESTHER SMITH (deceased).

December 13.

Probate.—Practice.—Probate in Fac-Simile.

In the Goods of
ESTHER
SMITH.

Where a Will, on the face of it, had been executed in 1858 and subscribed by two legatees named in it as witnesses, and was re-executed in 1860 and attested by different witnesses, and after the death of the testatrix was found with the first attestation clause and the names of the witnesses to it cancelled, but there was no evidence to show the date of the cancellation, the Court refused to exclude the part cancelled from probate, and directed the probate to go in *fac-simile*.

The deceased, Esther Smith, died on July 30, 1863, leaving a will, which was duly executed on the 24th of March, 1858, concluding:—"And I do hereby declare this to be the last will and testament of me, Esther Smith.

"Signed and sealed in the presence of me by me in the presence of Esther Smith, this 24th day of March, 1858.

"ELIZABETH MARY SMITH.

"HELEN SMITH.

"Signed and sealed by me, the testator, Esther Smith, in the presence of us,—

"BETTY HARLAND and

"ELLEN BARNES (her + mark)."

Ellen Barnes deposed that in the year 1860, the testatrix,
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1864. with whom she was then living as a servant, called her and
December 13. Betty Harland into the parlour, and stated that she wished to
In the Goods of put her affairs straight, and requested them to put their names
ESTHER as witnesses to her will, which was lying upon the table already
SMITH. signed. In the presence of the testatrix and of each other,
Ellen Barnes then signed her name, and Betty Harland put
her mark. There were certain alterations and interlineations
in the will, respecting which the witnesses were unable to give
any information, and there was also an unexecuted document,
in the nature of a codicil, on the third page of the sheet of
paper upon which the will was written. When the will was
found, after the death of the testatrix, so much of the first
attestation clause as is printed in italics, and the names of the
witnesses Elizabeth Mary Smith and Helen Smith, who were
named legatees in the will, had been struck through with a
pen, but there was no evidence to show when or by whom this
had been done.

Dr. Spinks moved the Court to decree probate of the will
without the alterations and interlineations, and without the un-
executed addition on the third page. The only question is,
whether the testatrix acknowledged her signature in the pre-
sence of Ellen Barnes and Betty Harland. Her request that
they would put their names as witnesses to her will, her signa-
ture being already there, was a sufficient acknowledgment (*In*
the Goods of Warden, 2 Curt. 334). It would be more con-
venient if probate were granted, omitting the first attestation
clause and the names of the witnesses who subscribed the will
in 1858; for no question could then be raised whether those
witnesses had forfeited their legacies; although there is no
proof, the reasonable presumption is, that those names were
struck through by the testatrix before the will was re-exe-
cuted.

SIR J. P. WILDE: In the absence of evidence, I cannot

presume, that the first attestation clause and the names of the witnesses written against it were struck through by the testatrix before the will was re-executed. They must, therefore, be included in the probate. The probate will be a *fac-simile* of the will, omitting the alterations and interlineations, and also the unexecuted addition on the third page.

1864.

December 13.

In the Goods of
ESTHER
SMITH.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

1864.
November 8.

M— (falsely called H—) v. H—.

M—
(falsely called
H—)

*Petition for Nullity.—Suspension of Decree.—Decree made on
Subsequent Motion.*

v.
H—.

The woman petitioned for nullity by reason of the man's alleged impotency. The petition was opposed, and at the hearing, the Court, in the circumstances proved, suspended its decree; but now on affidavits to the effect that the woman had returned to cohabitation, and that the marriage remained unconsummated, made a decree of nullity, the respondent not appearing on the motion.

This was an application to make a decree of nullity of marriage at the petition of the woman. The petition had been heard before the Judge Ordinary, in June last. There was no apparent incapacity on the part of the man; the cohabitation had lasted for rather less than three years; from these and other circumstances of the case, the Judge Ordinary suspended his decree, and suggested the policy of the petitioner returning to cohabitation with the respondent for a time (see *ante*, 520).

Dr. Spinks (*Mr. Searle* with him) now moved the Court to make a decree of nullity on affidavits of the petitioner, of *Dr. Farre*, of the petitioner's father, and of others, from which it appeared that after a good deal of correspondence between the petitioner and respondent, and apparent hesitation or reluctance on his part, the parties had slept together from the 2nd of September till the 7th of October, that the marriage had remained unconsummated, notwithstanding attempts on the part of the respondent to consummate it, and that, as far as was known, he had left England for Africa about the 10th of October.

1864.
November 8.
—
M—
(falsely called
H—)
v.
H—.

No appearance on this motion was given for the respondent.

THE JUDGE ORDINARY: I think the petitioner has acted wisely, and I am satisfied that she is entitled to the decree of nullity which I now pronounce.

WELLS v. WELLS AND COTTAM.

Suit for Nullity.—*De facto Husband and Wife Respondents.*
—*Costs.*—*Sect. 51 of Divorce Act.*

November
and 15.
—
WELLS
v.
WELLS AND
COTTAM.

The petitioner, father of a *de facto* husband, sued for decree of nullity by reason of undue publication of banns. The *de facto* wife defended the suit, the issue in which was tried by a jury, who found a verdict against her, and the Court made a decree of nullity.

On motion to condemn the husband in the wife's costs, the Court held that the 51st section of the Divorce Act gave it power so to do, if the circumstances of the case warranted it; but that as the wife, by not going into the witness-box, had shown that she had no reasonable ground of defence to lay before the jury, her costs were not made necessary by the conduct of the husband, and rejected the motion.

1864. This was a suit for a decree of nullity of marriage on the
 November 8 and 15. ground of undue publication of banns, brought by the father
 ——— of the *de facto* husband, a minor (see earlier stages of the
 WELLS case, *ante*, 364).
 v.
 WELLS AND COTTAM. The issue was ultimately tried by a jury and found in favour
 of the petitioner, and the Court made a decree of nullity.

November 8. *Dr. Wambey*, on behalf of the respondent Cottam, now
 prayed to condemn the other respondent, the *de facto* husband,
 in her costs. It is true that the evidence showed that the re-
 spondent Cottam was consenting to the undue publication of
 banns, but it also showed that it was at the earnest solicitation
 of the man, who went through the form of marriage with her,
 that she did so; in such a case the woman is without means
 of defence, unless the *de facto* husband is liable. Apart
 from the particular facts of the case, it is a general principle
 that a *de facto* wife, a party to any suit in the Matrimonial
 Court, is entitled to have costs taxed against the *de facto*
 husband.

THE JUDGE ORDINARY having ascertained that the *de facto*
 husband had not notice of the motion, directed that such no-
 tice should be given, and said that he should be ready to dis-
 pose of the application on a subsequent motion day.

November 15. *The Queen's Advocate* (Sir R. J. Phillimore) now opposed
 the application on the part of the *de facto* husband. There is
 no precedent for condemning one of two co-defendants in the
 costs of the other.

BY THE COURT: The words of the 51st section of the Di-
 vorce Act are very wide:—"The Court, on the hearing of any
 "suit, proceeding, or petition under this Act, and the House
 "of Lords, on the hearing of any appeal under this Act, may
 "make such order as to costs as to such Court, or to such

"House, respectively, may seem just; provided always that "there shall be no appeal on the subject of costs only;" and under the 34th section the co-respondent has constantly in effect to pay the costs of the respondent.

1864.
November 8
and 15.
—
WELLS
v.
WELLS AND
COTTAM.

The Queen's Advocate : At all events the *de facto* wife in this case had no real defence to the suit, as was proved by her not going into the box to contradict the evidence of the other respondent.

THE JUDGE ORDINARY : As to the principle relied on by Dr. Wambey, that the husband must always pay the wife's costs, I cannot think, on a review of the cases decided before and since the existence of this Court, that any such general rule exists where husband and wife are both respondents in the same suit. I think the effect of the 51st section of the Divorce Act is to give the Court power, after it has heard the case, and has before it the merits of all the parties to the suit, to throw the costs on either of the parties. If the necessity of this contested suit had been caused by the conduct of the man in inducing the woman, who may be taken to have been a good deal under his control, to act in this or that way as to the circumstances of the marriage, I should have been inclined to throw her costs upon him ; but the costs of the defence in this case were not occasioned by his conduct ; it was not necessary for her to defend the suit, if she had no facts to lay before the jury. At the trial she did not go into the witness-box to contradict or qualify the husband's statement ; the defence was therefore unnecessary, and I shall make no order as to her costs.

1864.

November 8.

PORTER

v.

PORTER AND
JAGGARD.

PORTER v. PORTER and JAGGARD.

Pleading.—Omission of Name of Adulterer.—Amendment.—Practice.

A general allegation of adultery, not specifying person, place, or time, is bad, and will be struck out.

This was a petition by a husband for dissolution of marriage. The petition, which was dated October, 1864, alleged, in the third paragraph, "That since the 8th day of October, 1846, "the said Elizabeth Porter has on divers occasions committed "adultery." In the fourth paragraph, "That from the month "of April, 1864, and up to the present time, she, the said Eliza- "beth Porter, has been habitually visited at her residence at "Chick, St. Osyth, in the county of Essex, by Benjamin Jag- "gard the younger, and that on divers of such occasions, and "particularly on the night of the 31st day of August last, she "there committed adultery with the said Benjamin Jaggard "the younger."

Mr. Searle moved for an order to amend the petition by striking out the third paragraph, or by inserting in it particulars of the person with whom, the dates when, and the places where the acts of adultery therein referred to were committed. It is not a case for particulars, but for amendment; for unless the charges are stated in *the petition* with reasonable certainty as to person, place, and time, the respondent does not know how to frame her answer. To one charge she might plead condonation, to another connivance, and to another a mere traverse.

He cited *Windham v. Windham and Giuglini*, 32 L. J. P. M. & A. 89.

He also moved for further particulars of the charge of adultery in the fourth paragraph.

Dr. Spinks for the petitioner: It is not a case for amendment, but for particulars. The respondent will not be prejudiced by taking that course, and it would be inconvenient to insert the name of an alleged adulterer in a petition against whom the petitioner might not have conclusive evidence, because if his name is inserted he must be made a co-respondent, 20 & 21 Vict. c. 85, s. 81. [THE JUDGE ORDINARY.—Then the name of the alleged adulterer is omitted for the purpose of evading the directions of the Act of Parliament.] The fourth paragraph sufficiently specifies the nature of the charge.

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PORTER

v.

PORTER AND
JAGGARD.

THE JUDGE ORDINARY: The third paragraph must either be struck out or amended by inserting particulars. In its present form it violates the rule that a charge of adultery should be alleged with reasonable certainty. The fourth paragraph is sufficient without further particulars. The respondent may have fourteen days to file an answer after the petition has been amended as ordered.

BANCROFT v. BANCROFT and RUMNEY.

November 15.

Cross Suits for Judicial Separation and Dissolution.

BANCROFT

v.

BANCROFT
AND RUMNEY.

Where there were cross suits, and the wife in her suit (which was for a judicial separation on the ground of cruelty), was by the verdict of the jury acquitted of the charges of adultery alleged in the husband's answer, the Court refused to allow this verdict to be pleaded in answer to the husband's petition for dissolution in which the same acts of adultery were charged.

This was a suit for dissolution of marriage on the ground of the wife's adultery. There was a cross suit by the wife for

1864. judicial separation, on the ground of cruelty, in which the husband had charged his wife with the same acts of adultery as those charged in his petition for dissolution.

November 15.
BANCROFT
v.
BANCROFT
AND RUMNEY.

The issues raised in the suit for judicial separation were tried before the Judge Ordinary, by a jury, in July, 1864, when the jury found that Mr. Bancroft had been guilty of cruelty, and that Mrs. Bancroft had not committed adultery.

At the trial Mrs. Bancroft was examined, and she denied that she had been guilty of adultery.

Dr. Spinks, on behalf of Mrs. Bancroft, moved for leave to plead the verdict of the jury in the suit for judicial separation in answer to the husband's petition for dissolution of marriage. A question once brought in issue and decided cannot be again controverted between the same parties.

Dr. Swabey, contra : In this suit the evidence of the parties is not admissible. In the suit for judicial separation it was, and Mrs. Bancroft was called as a witness, and denied the adultery. The verdict in the former suit having been obtained partly on evidence inadmissible in this suit is not an estoppel. *Stoate v. Stoate*, 2 Swab. & Tris. 223 ; *Sopwith v. Sopwith*, 2 Swab. & Tris. 169.

Dr. Spinks, in reply : The admissibility of the evidence of the parties is a mere accident to the form of the suit, and has no bearing on the question. The same issue ought not to be tried twice between the same parties. In *Bremner v. Bremner and Brett* a similar order was made.

THE JUDGE ORDINARY : It seems to me that the law, by making the evidence of the parties admissible in one suit and not in the other, has virtually declared that in cases of this kind the issue as to the wife's adultery may be twice tried, the same issue being triable on different principles in the two

suits : by one species of evidence in the one, and by another in the other. The Court is bound to administer the law as it exists. Upon the authorities cited, I think that the suit for dissolution must go on to trial. I may remark, that in the Courts of Common Law a prior verdict cannot be set up in answer to an action founded on the same cause of action. It is only the judgment founded upon such a verdict which would be a bar. In suits in this court the decree would take the place of the judgment of a Court of Common Law.

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November 15.
BANCROFT
v.
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AND RUMNEY.

Dr. Swabey : The costs of this application ought not to be taxed against the husband, as the question raised has been already decided.

THE JUDGE ORDINARY : I shall make no order as to costs.

RE MULOCK.

Contempt of Court.—Letter threatening a Suitor.—Punishment by Fine.—Costs of Application to the Court.

July 19, 29,
November 3,
and
December 13.
RE MULOCK.

It is a contempt of Court to write a letter threatening, if a petition is not withdrawn, to issue a publication respecting the petitioner in a pending suit.

The Court imposed a fine of £300 on a person who had been guilty of a contempt of that nature, but the threat being withdrawn, it remitted the fine on payment of the costs of the application. Those costs not being paid, and the person guilty of the contempt having refused to pay them, the Court directed that the fine should be estreated.

Mr. Serjeant Ballantine (*Mr. Hannen* with him) moved on affidavit for a rule *nisi* for an attachment against *Mr. T. Mulock* for contempt of Court. The contempt consisted in having sent a threatening letter to *Mrs. Chetwynd*, the petitioner in

July 19.

1864. a suit pending in the Court for dissolution of marriage. He
 July 19. referred to *Shaw v. Shaw*, 2 Swab. and Trist. 517. The letter
 Re MULOCK. was in the following terms:

“Stafford, July 16, 1864.

“Madam,—I beg to acknowledge the receipt of your letter.
 “I pity you from my heart. You are terribly deceived, and
 “your crafty law advisers have fostered your deception. You
 “seem unaware of the abyss opening before you. However, I
 “must act as befits a Christian man to whom an appeal has
 “been made, and I now inform you that if, on or before
 “Wednesday next, the 20th instant, your suit in the Court
 “of Divorce be not withdrawn, I will, on my own responsi-
 “bility, apart from Mr. Chetwynd or any one else, publish the
 “full truth of the case, founded upon my own various commu-
 “nications with your own friends, and accompanied with a
 “statement of facts concerning yourself from before your
 “marriage up to the present time, borne out by irrefragable
 “documents.

“I am, Madam, your obedient servant,

“T. MULOCK.

“Mrs. Blanche Chetwynd.”

THE JUDGE ORDINARY: The affidavit of Mrs. Chetwynd discloses an attempt by a third person to prevent her from laying her case before the Court by threats of bringing her into disgrace and disrepute. A rule *nisi* will therefore be granted.

July 26. Mr. Mulock appeared in court, but declined to make a promise that he would not issue any publication respecting Mrs. Chetwynd.

THE JUDGE ORDINARY suspended his judgment in order to give Mr. Mulock an opportunity for reconsideration.

Mr. Mulock again appeared in court, but still declined to give the required promise.

1864.

July 29.

Re MULOCK.

THE JUDGE ORDINARY: Then it only remains for the Court to pronounce judgment. [After reading the letter above set out, his Lordship continued.] From the pressure of this threat Mrs. Chetwynd seeks protection, and she claims the right to approach this court free from all restraint or intimidation. It is a right that belongs to all suitors. Mr. Mulock has appeared to show cause against the imputation thus made against him. He did not deny the fact that he sent the letter, and, although he disclaims all desire to threaten the petitioner, he distinctly reiterated his intention to make the publication referred to. Mr. Mulock, therefore, in the face of the Court, practically adheres to the threat he has made. No one can doubt that the very offering of such a threat to a suitor in this Court, for such a purpose, is in itself, and quite independently of its subsequent fulfilment, a contempt of Court. In *Shaw v. Shaw*, 2 Swab. & Trist. 519, the late Sir Cresswell Cresswell so decided, if, indeed, authority were needed. I own I was surprised, that when the legal effect of what he had done was pointed out to Mr. Mulock, he did not express himself prepared at once to retrace his steps, and to cease from further interference with Mrs. Chetwynd's suit; and the more so, as it appeared from his own statement in court, that he had no interest whatever in the matter, and only a very recent acquaintance with Mr. Chetwynd. Had Mr. Mulock, under these circumstances, been content to give the Court an assurance that he would go no further in his endeavour to intimidate Mrs. Chetwynd, the Court might properly have taken no further notice of this most improper letter. All this I intimated to him the other day, and I gave him the opportunity of considering the matter, and consulting his friends. The result is that he still adheres to the determination expressed in his letter, and refuses all assurance that he will desist from

1864.

July 19.

Re MULOCK.

executing his menace. The Court has no alternative but to adjudge him guilty of a contempt, and to order him for the same to pay a fine of £300. The future is in Mr. Mulock's own hands. If he persists in the course which he says he has marked out for himself as a Christian, and by act or deed, by writing or publishing, makes any further attempt to stand between Mrs. Chetwynd and her free access to this Court, I wish him to understand that he will subject himself to further punishment by fine or imprisonment, or both. If, on the other hand, being satisfied that he is acting illegally, he should hold his hand and submit to the authority of the Court, I shall be prepared to attend to any application that he may make next term for the remission of this fine, and for that purpose I shall direct the officer of the Court not to estreat the fine until the fourth day of next term.

November 8. Mr. Mulock appeared in person, and said that he had come to the conclusion that he had been wrong, and had been really usurping the functions of judge, jury, and witnesses. He had not published, and would not publish, a syllable respecting the case.

THE JUDGE ORDINARY then directed that the fine should not be estreated.

November 14. THE JUDGE ORDINARY said he had omitted to mention that in accordance with the usual practice, Mr. Mulock must pay the costs of the application against him. The fine would be remitted on payment of those costs.

December 13. Mr. Mulock appeared in court, and stated that the costs had been taxed, and that he declined to pay them.

THE JUDGE ORDINARY: Mr. Mulock was brought before the Court for writing a letter for the purpose of intimidating

a suitor, and I held that he had been guilty of contempt. A fine was imposed, but I afterwards announced to him, that as he had withdrawn the threat contained in the letter, I would not order the fine to be estreated. I afterwards intimated that this course would be taken only on his paying to the other side the costs, which they necessarily incurred in coming to the Court for protection. Mr. Mulock has now intimated that he does not propose to follow the lenient course I left open to him, and that he refuses to reimburse the applicants in the necessary costs of their application. The consequence is that the fine must be estreated.

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July 19.

Re MULOCK.

COOKE v. COOKE AND ALLEN.

November 22.

Dismissal of Husband's Petition.—Wife's Costs.

COOKE

v.

COOKE AND
ALLEN.

Where the husband's petition is dismissed, and the wife's costs of the hearing exceeds the sum secured or paid into the registry to meet them, the husband is liable to pay the balance.

Application for the balance should be made on summons, and not on motion.

This was the husband's petition for dissolution of marriage. The respondent denied the adultery, and also charged the petitioner with wilful neglect and misconduct conducing to the adultery, and with separation without reasonable excuse.

The issues came on for trial on the 14th of May, before the Judge Ordinary and a jury.

The witnesses called for the petitioner declined to give evidence, unless their expenses were first paid; and as the petitioner's solicitor was not then able to tender such expenses, no evidence was offered. A verdict was accordingly taken for the respondent, and the petition was dismissed, with costs.

1864. The petitioner had given security for £55, to meet the respondent's costs of the hearing. These had since, on taxation, been found to amount to £71.

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COOKE
v.
COOKE AND
ALLEN.

Dr. Swabey, on behalf of the respondent, now moved the Court to order that the petitioner should pay to the respondent £16, the difference between the taxed costs of the hearing and the sum for which security had been given. As the petition was dismissed, the respondent is entitled to all the costs of the hearing. He also asked for the costs of the motion.

THE JUDGE ORDINARY: The dismissal of the petition, with costs, entitled the wife to all the costs of the hearing, although they might exceed the sum for which security was given. A motion was, therefore, unnecessary, and I cannot allow the costs of it, but merely the costs of a summons.

November 22.

ROLT v. ROLT.

ROLT
v.
ROLT.

*Cross Suits.—Dissolution on Ground of Wife's Adultery.—
Wife's Costs of her Suit.—Practice.*

Where there were cross suits, and the marriage was dissolved on the ground of the wife's adultery, the Court held, that the husband was not liable for the costs of the wife in her suit, inasmuch as she had not taken the ordinary steps to get them taxed previous to the final determination that she had been guilty of adultery.

The decree pronouncing her guilty of adultery should be pleaded to entitle the Court to take notice of it.

This was a suit instituted by the wife, for restitution of conjugal rights.

Dr. Spinks, for the respondent, moved the Court to dismiss

the petition. It appeared upon affidavit that in a cross suit by the husband, for dissolution of marriage, a decree absolute had been pronounced, after a verdict finding the wife guilty of adultery.

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v.
ROLT.

Mr. C. Russell, for the petitioner, consented to the petition being dismissed, upon payment of costs. [THE JUDGE ORDINARY: Is the petitioner, after she has been found guilty of adultery, entitled to costs?] It has not been proved in this suit that she has been guilty of adultery. She is therefore entitled to costs. I only ask for costs up to the time of the decree being made absolute. He referred to *Holt v. Holt and Fleming*, 28 Law J. Rep. (N. S.) P. & M. 12. [THE JUDGE ORDINARY: I think that, in strictness, it ought to have appeared in the suit that the petitioner had committed adultery.]

Dr. Spinks, contrà: The marriage having been dissolved on the ground of the petitioner's adultery, she is not entitled to costs. The parties are no longer husband and wife.

THE JUDGE ORDINARY: She only asks costs up to the date of the dissolution of the marriage; that is, costs incurred while she was a wife.

Dr. Spinks: If a wife does not apply for her costs before she is found guilty of adultery, she is not entitled to have them taxed. If the wife had applied for her costs before the verdict finding her guilty of adultery, she would have been entitled to them; but not having done so, she has by her *laches* foregone her right.

THE JUDGE ORDINARY: I think that I cannot dismiss the petition without the petitioner's consent. That is, however, a mere matter of form. With respect to costs, if it had ap-

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ROLT
v.
ROLT.

peared in this suit that the wife had been guilty of adultery, from the moment when that was finally determined, the wife not having previously taken the ordinary step to get her costs taxed, she would have lost all right to them. It seems to me, therefore, that she really is not entitled to costs.

Mr. C. Russell: I am not instructed to consent to the petition being dismissed, except upon payment of costs.

THE JUDGE ORDINARY: Then I will give the respondent leave to put on the record a plea that the petitioner has been pronounced guilty of adultery.

Dr. Spinks: The respondent will consent to pay £10 *nomine expensarum*, if the petitioner will allow the petition to be dismissed.

Mr. C. Russell consented.

THE JUDGE ORDINARY: Then I order the petition to be dismissed, on the respondent paying the petitioner £10 *nomine expensarum*.

December 6.

MOORE
v.
MOORE.

MOORE v. MOORE.

Permanent alimony.—Income.

The wife applied for permanent alimony on a decree for judicial separation by reason of cruelty. The husband stated on affidavit that, since the petition for alimony *pendente lite* an answer had been filed, he had parted with his business (which was the principal source of income) for a yearly payment of £300 for seven years, and 5 per cent. on the value of warehouse, stock-in-trade, debts, etc.

The Court held, that, in allotting alimony, the £300 yearly must be taken as income, observing that, if the income really failed, the husband could apply for reduction of alimony.

1864.
December 6.

MOORE
v.
MOORE.

This was an application for permanent alimony. On the 1st of March, 1864, alimony *pendente lite* had been allotted at the rate of £90 yearly.

A decree for judicial separation by reason of the husband's cruelty was pronounced on the 11th of November, 1864.

Dr. Tristram moved the Court to decree permanent alimony on the same amount of income as was ascertained when the order for alimony *pendente lite* was made, which would give permanent alimony at the rate of £150 per annum.

Dr. Spinks, for the husband, contended that an affidavit made by him showed that his income was not now so much as it had been when the alimony *pendente lite* was allotted. The material part of the affidavit for the present purpose was as follows :—"That since the date of the petition for alimony "*pendente lite*, and answer thereto, I have entirely sold and "disposed of my business, from which my income was derived, "to Henry Johnson, and C. Bock Harrison, in a considera- "tion for a yearly payment for seven years, from the 29th of "September last of £300, and in further consideration of "their paying me interest at the rate of 5 per cent. per annum on "the value of the warehouse and office, furniture, fixtures, book- "debts and accounts, and stock-in-trade, estimated to be worth "the sum of £3500, but subject to the deductions hereinafter "referred to, and that a transfer of the said business, stock- "in-trade, book-debts, and other effects, has been made by "deed, dated the said 29th of September, 1864, and posses- "sion of the said business, etc., has been given to the said "firm of Harrison and Johnson, and I believe they intend to "carry on the said business in copartnership."

1864. Counsel contended that the £300 for seven years ought to be treated as capital.
December 6.

MOORA
v.
MOORE.

Dr. Tristram: The husband has his skill and industry, which may be employed in other business. If at the end of seven years his income is really diminished, he may apply to have the rate of alimony reduced. It was a gross case of cruelty.

THE JUDGE ORDINARY: I think, for the present purpose, I must consider the £300 yearly as so much income. If the income really fails, the husband can apply to reduce the alimony. The circumstances of the case were not such as to entitle the husband to any indulgence; he had acted with savage violence towards the petitioner, who was much injured in consequence. I order alimony at the rate of £150 yearly, payable quarterly to the petitioner herself.

Dec. 9 and 15.

(Before the JUDGE ORDINARY and a *Special Jury*).

STONE
v.
STONE AND
APPLETON.

STONE v. STONE AND APPLETON.

Issue between Husband and Wife.—No appearance by co-respondent.—Damages.

On an issue of adultery raised between husband and wife, to be tried by a jury, who have also to assess damages against a co-respondent who has not appeared, no evidence which is not admissible against the respondent can be given to show that the co-respondent has been guilty of adultery; but evidence in aggravation of damages is admissible:

The jury found a verdict for the respondent, and assessed the damages at one farthing.

This was the husband's petition for dissolution of marriage

by reason of his wife's alleged adultery with Mr. Appleton, against whom he claimed damages. The respondent had appeared and traversed the charge of adultery, the co-respondent had not appeared. The issue of adultery raised by the respondent and the assessment of damages were therefore before the jury.

1864.
Dec. 9 and 15.

STONE
v.
STONE AND
APPLETON.

The *Queen's Advocate* (Sir R. J. Phillimore), (*Mr. H. C. Lopes* with him) claimed to read, as against Appleton, a letter written by him to the petitioner; the jury would have to assess damages.

Mr. Coleridge, Q.C. (*Dr. Spinks* and *Mr. Searle* with him), for the respondent, objected. On the issue now before the jury we have nothing to do with Appleton. The petitioner may be entitled to a verdict and damages against him by default. It is like judgment by default as regards one in an action against two co-contractors.

THE JUDGE ORDINARY: I think, in such circumstances, the rule must be thus: any evidence simply tending to show that Appleton had committed the act of adultery, such evidence not being admissible against Mrs. Stone, is not admissible on this issue; but you can make use of any evidence that tends to aggravate damages.

At the conclusion of the case the learned JUDGE ORDINARY made the following remarks to the jury as to Appleton's position:—

The question of fact you have to decide is, whether Mrs. Stone is proved to have been guilty of adultery with Mr. Appleton; you will further have to assess damages against Mr. Appleton with reference to the adultery with which he was charged, but on which no issue was raised. These matters are brought before you in a certain connection, but they are distinct, and must be kept distinct as if they were

1864. two separate causes tried by two separate juries. How to
Dec. 9 and 15. deal with Appleton I will tell you presently.

STONE
v.
STONE AND
APPLETON.

*The jury found a verdict for the respondent, and,
under the direction of the Judge Ordinary, assessed
the damages against Mr. Appleton at one farthing.*

December 16.

(Before THE JUDGE ORDINARY and Special Jury.)

BANCROFT
v.
BANCROFT
AND RUMNEY.

BANCROFT v. BANCROFT AND RUMNEY.

Trial.—Surprise.—Adjournment.—Costs.

When the petitioner at the trial opened evidence, which was admissible on the record, but took the other parties by surprise, the Court adjourned the trial, and, as the adjournment was made necessary by the conduct of both parties, refused to make any order as to costs of such adjournment.

The jury were dismissed by consent of all parties.

This was question of practice in the following circumstances: It was the husband's petition for a dissolution of marriage, dated the 16th of February, 1864. On the 15th of March, 1864, THE JUDGE ORDINARY made an order on the petitioner "to deliver within a week from this date further "and better particulars of the dates and places when and "where the respondent is, in the petition filed in this cause, "alleged to have committed adultery with the co-respondent, "or that he do within the like time file an affidavit that he "cannot furnish such particulars, and I do further order that "this said petition be amended by adding to the third paragraph thereof the words as hereinafter set forth." A similar order was obtained on behalf of the co-respondent.

By affidavit of the 17th of March, 1864, the petitioner gave

certain particulars of place, and further stated, "And I, lastly, say, that in consequence of the relationship and intimacy subsisting between the respondent and co-respondent, they have been during the period set forth in the petition constantly in each other's society, and that I am not in possession of evidence which enables me to give more precise dates or any further particulars of places in respect of the adulterous intercourse alleged in the said petition."

The petition ended with a general allegation of adultery between April, 1863, and February, 1864, at places unknown. The issues of adultery were ordered to be tried by a special jury. The record for the jury (see rule 22), after setting forth the specific allegations of adultery, concluded thus: "And did further allege that upon divers other occasions, between the month of April, 1863, and the present time (to wit, the 16th February, 1864, the date of the said petition), the said Elizabeth Bancroft committed adultery with the said William Rumney in divers places unknown to him, the petitioner."

The case came on for trial before THE JUDGE ORDINARY, by a special jury, on December 16.

Mr. Overend, Q.C., *Mr. Coleridge*, Q.C., and *Dr. Swabey* for the petitioner.

Mr. M. Chambers, Q.C., and *Dr. Spinks* for the respondent.

Serjt. Ballantine and *Mr. Staveley Hill* for the co-respondent.

Mr. Overend, in opening the petitioner's case, stated generally the evidence to be offered in support of the specific charges, and then stated evidence to show that on two other occasions the respondent and co-respondent had gone together to houses of ill-fame.

1864.
December 16.
BANCROFT
AND RUMNEY.

1864. Counsel for respondent and co-respondent objected that this
 December 16. evidence took them by surprise, and that there was nothing in
 the charges in the petition which would admit it. They re-
 BANCROFT ferred to the order for particulars and affidavit of petitioner
 v. BANCROFT AND RUMNEY. before set out.

Counsel for the petitioner urged that his affidavit must be taken to have been true at the date it was made; since then evidence of fresh cases had been obtained; and that under the concluding paragraph of the record for the jury, which the respondent and co-respondent had allowed to stand without complaint, the evidence would be admissible.

THE JUDGE ORDINARY: The evidence is, no doubt, admissible on this record; but, as it takes the respondent and co-respondent by surprise, I think the case must be adjourned if their counsel wish it, unless counsel for the petitioner will give up the evidence opened on the general allegation.

This petitioner's counsel refused to do, and counsel for the other parties claimed an adjournment.

On the question of costs of the adjournment,

THE JUDGE ORDINARY said: As regards this adjournment, neither party is free from blame. The petitioner has obeyed the order of the Court made on him as he best could at the time, and the evidence suggested is, no doubt, admissible on this record; but when he became aware of this fresh evidence tending to establish a distinct charge of adultery, he ought to have given the other side notice. On the other hand the respondent and co-respondent have come to trial without having taken any objection to the record as settled for the jury. This they might have done at any time; the surprise is, therefore, partly owing to their neglect. I shall make no order as to costs.

Trial adjourned till jury sittings in next term. Jury dismissed by consent of all parties.

(Before the JUDGE ORDINARY in Chambers.)

POLLARD v. POLLARD AND HEMMING.

Damages.—Petitioner and Co-Respondent.—Discovery and Inspection.

1864.

December 20.

POLLARD
v.
POLLARD
AND
HEMMING.

P. petitioned for dissolution of marriage and for assessment of damages. The Judge, on summons, at the instance of the co-respondent, ordered the petitioner to bring into the registry letters written by the respondent to him, or to file an affidavit that he had no such letters, or that they contained no such matters as suggested by the affidavits in support of the summons.

This was the husband's petition for dissolution of marriage by reason of the adultery of the respondent and co-respondent. Damages in the sum of £5000 were claimed by the petitioner. The co-respondent had traversed the allegation of adultery.

The present application was a summons to show cause why the petitioner should not bring into the registry all letters written by the respondent to the petitioner, from January 1856 to the present time, and why the co-respondent should not be at liberty to inspect the same and take copies thereof.

The following affidavit of the co-respondent was filed in support of the summons:—

"1. I am advised and believe that it is materially and essentially necessary that I should know, for the purpose of preparing for my defence in this suit, and that I should be able to prove at the trial thereof, at what places severally the respondent resided since her leaving the petitioner in India, and that I should know and be able to prove that the petitioner knew that she resided in the said several places or some of them.

"2. I am advised and believe that it is material and essentially necessary for me to know and be able to prove, for the like respective purposes, who the persons were with whom the respondent resided and associated, and desired to

1864. "reside and associate respectively during the same period,
 December 20. "and that I should know and be able to prove that the peti-
 POLLARD tioner knew of the respondent's residing and associating
 v. "respectively, and desiring to reside and associate respec-
 POLLARD "tively with certain persons during the same period or some
 AND "parts thereof.
 HEMMING.

"3. I have been credibly informed and believe that the
 "said petitioner received several letters from the said respon-
 "dent in the years 1855-6-7, and in the year 1861, and
 "between that year and the commencement of this suit,
 "whereby, if produced, the matters aforesaid, or some of
 "them, material and necessary to enable me to prepare for
 "my defence in this suit, will appear.

"4. I am unable to ascertain, and have no means of know-
 "ing, notwithstanding inquiries made by me, without an
 "inspection of such letters, the dates or respective material
 "contents thereof, or where they were written from respec-
 "tively, or that the petitioner knew the said material facts
 "therein appearing as aforesaid.

"5. If such letters be not produced to me, or to my soli-
 "citors, to inspect and take copies or extracts therefrom, as
 "may be advised, I shall be unable duly and properly to in-
 "struct my solicitors, and they will be unable to prepare my
 "defence in this suit so as to prevent a failure of justice
 "therein.

"6. Application not for purpose of delay.

"7. Advised and believe have a good defence to this suit
 "on the merits."

An affidavit of Mr. Meyrick, the co-respondent's solicitor,
 nearly to the same effect, was filed.

Dr. Swabey, on these affidavits, supported the summons.
 He referred to the order made in *Winscom v. Winscom and
 Plowden*, 3 Swab. & Trist. 383, note; to 14 & 15 Vict. c. 99,
 s. 6; C. L. P. A. 1854, s. 50; Day's C. L. P. Acts, p. 221,

et seq.; and to the fact that a heavy sum was claimed for damages.

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Dr. Tristram, for the petitioner, *contra*: This is going beyond *Winscom v. Winscom and Plowden*. There is no precedent for it.

POLLARD

v.

POLLARD

AND

HEMMING.

THE JUDGE ORDINARY: Considering the powers given by the Common Law Procedure Acts, and the mode in which the common law courts are in the habit of carrying out those powers, I think this is a reasonable application. What passed between husband and wife may be given in evidence to aggravate damages; it is only reasonable that the co-respondent should have an opportunity, in a like way, of diminishing damages. I order the petitioner to bring the wife's letters into the registry, or to file an affidavit that he has none, or that they contain no such matters as suggested. If the letters are brought in I shall look at them, and then give the co-respondent leave to inspect them if I think it right that he should do so.

INDEX TO THE PRINCIPAL MATTERS.

INDEX TO PROBATE CASES.

ADMINISTRATION.

1. *Administration with Will annexed to Assignee in Bankruptcy of Residuary Legatee.—Grant to Assignee in Bankruptcy of a Creditor.*

A. died leaving a will, whereof he appointed B. executor and residuary legatee. B. proved the Will, and afterwards became bankrupt, and subsequently died intestate, leaving part of the estate of A. unadministered. At the time of his bankruptcy B. was a creditor of A. The Court granted administration, with the will annexed, of the unadministered estate of A. to the assignee in bankruptcy of B. in the character of assignee of a residuary legatee. Semble, that the assignee would also have been entitled to the grant as assignee in bankruptcy of a creditor of A.—*Donnward v. Dickenson*, 564.

2. *Administration to Attorney of Party entitled.—Form of Authority.*

If the Court, on the documents before it, is satisfied that the party entitled to a grant of administration desires the person applying to act as his attorney, it will not require a regularly executed power of attorney.—*In the goods of Morley* (deceased), 425.

3. *Administration to Creditor.—Affidavit of Date of Debt.*

The Court will not grant administration to a creditor without an affidavit of the date when the debt became due.—*Rawlinson v. Burnell and others*, 479.

4. *Administration de bonis non.—Assignee of Creditor.*

F. died in 1836, leaving a will and one codicil, and therein appointed three executors and residuary legatees in trust. Two renounced, and the third took probate, but died in 1853, intestate. All the beneficial residuary legatees named in the will and codicil then renounced except T., and on his being cited and not appearing, a grant *de bonis non* (will annexed) was made to K., as a creditor. He died in 1858, leaving personalty of F. unadministered. F. was indebted to his co-trustees of the marriage-settlement of D. in respect of certain trust-moneys misappropriated by him, which had been the subject of certain proceedings in

ADMINISTRATION—*continued.*

Chancery. By indenture of 28th of December, 1860, the executors of the surviving trustee agreed with the persons beneficially entitled to the trust-fund to transfer all their right and title to sue, etc., on receiving discharges from such persons; and the Court, on T. being cited and not appearing, granted to the nominee of the assignees of the executors of the surviving trustee administration *de bonis non* (will annexed) of F., limited to revive and substantiate the proceedings in Chancery.—*Day v. Thompson*, 169.

5. *Official Assignee of Creditor of Deceased.—Assignment of Debts to Purchaser.*—24 & 25 Vict. c. 134, s. 137.—*Assignment by such Purchaser.—Limited Grant to Assignee of Official Assignee.*

A., in 1813, assigned certain bills of exchange and negotiable instruments to B., who was, in 1833, adjudicated a bankrupt. In 1862, C. being his official assignee, assigned the sums remaining due and to become due on the said bills of exchange and the negotiable instruments to D. as purchaser, under the Bankruptcy Act, 1861, section 137, and D. sold and assigned them to E. The Court declined to make a grant of administration of the personal effects of A., limited to the aforesaid sums (the next of kin of A. having been cited and not appearing) to E.; but made the grant to D., as assignee of the official assignee.—*In the goods of William Coles* (deceased), 181.

6. *Administration under 73rd Section of Probate Act.—Practice.—Administration de bonis non.—Grant to one of two Administrators to represent a Trust Estate.*

D. H., executor and universal legatee of J. H., died, having proved the will, intestate. Administration of her effects was granted to her three children, one of whom had since died, and the other, E. L., was in Australia. A representation to J. H., was required for the purpose of surrendering a term of a certain property, of which he had been a trustee. The Court, on E. L. being cited by advertisement, and not appearing, granted administration to F. H. (her co-administrator) of the effects of J. H., with his will annexed.—*Hancock v. Lightfoot*, 557.

7. *Grant to Party without Interest.—Grant per saltum refused.*

A. died in 1831, an infant, leaving his father, B., the only person entitled to his personal estate. B. died, leaving a will, in which he named his wife, C., and D., executors, and C. universal legatee. B.'s will had never been proved. C. died, leaving a will, in which she named executors, and all her children, excepting E., residuary legatees. D. renounced probate of B.'s will, and the executors and residuary legatees of C. renounced their right to administer to A.'s estate, and consented to the administration going to E. The Court held it could not make the grant to E. unless he first represented B.—*In the goods of William Allen* (deceased), 559.

8. *Jurisdiction.—Effects in France and not in England.—Practice of French Courts.*

Where the deceased died in France, leaving personal estate there, but none in England, and it was alleged, that by the law of France her hus-

ADMINISTRATION—*continued.*

band, from whom she had eloped, could not establish his claim to her property there without a grant from this Court. Held, that the Court had no jurisdiction to make a limited grant to enable him to substantiate his claim to the property in the Courts of France.—*In the goods of Hannah Tucker* (deceased), 585.

9. *Next of Kin and Widow.*

The Court will, on sufficient cause shown by the next of kin, on motion, exercise its discretionary power and grant administration to such next of kin in preference to the widow.—*In the goods of Anderson* (deceased), 489.

10. *Administration with Will annexed.—Grant to a Residuary Legatee who established Will.*

Where the plaintiff and defendant were the residuary legatees named in a will, which had been propounded by the plaintiff, the Court made a grant of administration, with the will annexed, to the plaintiff, who had established it, in preference to the defendant, who had contested its validity.—*Podmore v. Whatton*, 449.

11. *Administration ad colligendum.—73rd Section of Probate Act.—Goods within Jurisdiction of Court.*

A foreigner, inhabiting the State of Alabama, in North America, died on board a British ship, on his voyage to England, possessed of property, chiefly bills of exchange drawn on merchants in Liverpool, and entitled to a sum of money alleged to be in the hands of another person in this country. On the arrival of the ship in the port of London, the owner took possession of the bills of exchange; and there being no known relation or agent of the deceased in this country, and communication with his relations in the Southern States of North America being difficult and uncertain by reason of the civil war and blockade of the Southern ports, the Court granted administration to the owner of the ship, limited to realize and collect the property which the deceased was possessed of or entitled to within the jurisdiction of the Court, and to invest the proceeds in Three per cent. Consols; the sureties to justify. The Court intimated that for the future it would be better that the Queen's Proctor should interpose in such cases for the protection of the property.—*In the goods of Peter Richmond Wyckoff* (deceased), 20.

12. *Next of Kin of Minors abroad.—Citation and Renunciation dispensed with.—Probate Act, 1857, Section 73.*

The Court granted administration under the 73rd section of the Probate Act, to the guardian elected by minors for their use and benefit, without requiring the citation or renunciation of their next of kin, where the property was very small and the next of kin were in Australia, and their interest was infinitesimal.—*In the goods of Charlotte Elizabeth Hagger* (deceased), 65.

13. *Probate Act, Section 73.—Grant to a Nominee of Parties interested.*

The Court will grant administration, with the consent of all the parties

ADMINISTRATION—*continued.*

interested in the property of the deceased, to their nominee who takes no interest in the property himself.—*Farrell v. Brownbill*, 467.

14. *Next of Kin a Pauper Lunatic.*—Administration under Section 73 of Probate Act to Guardians of the Poor.

- J. F. died intestate and a widow, leaving M. F., her daughter, the only person entitled in distribution. M. F. had been for some years in the county lunatic asylum, maintained at the charge of the hamlet of Mile-End Old Town. No committee of person or estate had been appointed. J. F. left a sum of money, principally in the funds, in the name of her late husband, under whose will she was entitled to it.

After the proper citations, the Court, under section 73 of the Probate Act, granted administration of the goods of J. F. to the Clerk of the Guardians of the Poor for the use and benefit of the lunatic, limited till the period of her lunacy; the sureties to justify.—*The Guardians of the Poor of the Hamlet of Mile-End Old Town v. Findlay*, 265.

15. *Revocation of Grant of Administration.*—*Domicil.*—*New Grant.*

- A Sardinian, who had settled in Brazil, died intestate on his voyage from Bahia to Genoa. He had wound up his affairs in Brazil, and intended to resume his domicile of origin at Genoa. An agreement had been come to between the Brazilian and Italian Governments with respect to the administration of his property and the guardianship of his children (some of whom were in Genoa and others in Brazil), by which the Brazilian Government gave up to the Italian Government all claim to such administration and guardianship.

The Court revoked a grant of administration which had been made to the representative of the person entitled to it according to the Brazilian law, and made a grant to the person entitled to it according to the Italian law.—*In the goods of Luigi Bianchi* (deceased), 16.

16. *Administration to Testamentary Guardians.*—*Renunciation by A. and B. as Executors and Residuary Legatees in Trust, but not as Testamentary Guardians on certain Contingencies.*—*Grant to A. and B. as Testamentary Guardians.*—*R. 50 of Non-Contentious Rules for Principal Registry.*

- A. and B. being appointed executors and residuary legatees in trust, and also guardians of the children of the testator on the death or second marriage of his widow, renounced their right to a grant as executors and residuary legatees in trust, but not as testamentary guardians of the children, who were beneficial residuary legatees substituted, and a grant of administration (with will annexed) was made to the widow, as beneficial residuary legatee for life. The widow died, leaving part of the estate unadministered, and five children by the testator, all minors. The Court made a grant of administration (with will annexed) to A. and B. as testamentary guardians of the children, the beneficial residuary legatees of the testator. The 50th rule of the Rules for the Principal Registry in Non-Contentious Business, which directs that no person who renounces probate or letters of administration in one character, is to be

ADMINISTRATION—continued.

allowed to take representation to the deceased in another character, is for the guidance of the registry, but capable of modification by the Court. The Court declined to depart from the practice of limiting the grant to the guardians until one of the minors should attain his majority, by the addition, "until he should apply for and obtain the grant."—*In the goods of William Kennett Loftus* (deceased), 307.

ADMINISTRATION BOND.

1. *Probate.—Cessate Grant.—Amount of Bond.—Probate Act, 1857, s. 82.*

F. appointed S. residuary legatee and executor, and in case of his decease leaving the directions of the will unperformed, substituted P. as executor. In August, 1850, probate was granted to S., who died in December, 1862, leaving certain legatees of income for their lives under the will surviving. P. renounced probate, and the widow of S. renounced administration with the will annexed. One of the legatees for life was entitled to administration with the will annexed, technically a cessate grant, on which a bond is usually required in double the amount of (a) the deceased's property at the time of death. The Court, under 82nd section of Probate Act, 1857, directed a bond to be taken in the same amount as would have been required if the grant had been one *de bonis non*.—*In the goods of Amelia Fozard* (deceased), 173.

2. *Administration to Attorney out of Jurisdiction.—Sureties out of Jurisdiction.*—17 & 18 Vict. c. 77, s. 18.

The Court is at liberty to accept as sureties to an administration-bond persons resident out of its jurisdiction, when the principal, who is also residing without the jurisdiction, is unable to procure sureties within the jurisdiction, provided a writ of summons is servable on the sureties under section 18 of the Common Law Procedure Act (17 & 18 Vict. c. 77).—*In the goods of Thomas Reed* (deceased), 439.

3. *Administration Bond.—Breach of Condition.—Citation on Surety to show cause against Bond being Assigned.—Probate Act, 1857, s. 83.*

On a *primâ facie* case of breach of administration bond being established, notice in some form having been given to the sureties, the Court will direct the bond to be assigned; but might refuse to do so, if on cause shown the proceeding appeared to be wholly frivolous and vexatious.—*Baker and Marshman v. Brooks*, 32.

4. *Administration Bond.—Breach of Condition.—Rule Nisi on Sureties to show cause why it should not be assigned.—Probate Act, 1857, s. 83.*

Where a person interested under the estate of a deceased intestate, to whom administration has been taken out, makes out a *primâ facie* case of breach of the administration bond, the Court will direct a rule *nisi*, calling on the sureties to show cause why the bond should not be assigned.—*In the goods of William Jones* (deceased), 28.

ADMINISTRATION BOND—*continued*.

5. *Administration Bond.—Condition for Payments of Debts.—Order to Assign.—Probate Act, Sections of, 81 & 83.—Practice.*

When a person makes out a *prima facie* case that there has been a breach of the condition of an administration bond, the Court will direct it to be assigned by the Registrar. The Court will not entertain objections to the validity of the condition of the bond, but will leave such question to be determined by a court of common law.—*Sandrey v. Mitchell and Another*, 25.

ATTACHMENT.

1. *Attachment against Married Woman.*

An attachment will not be granted against a married woman for disobedience of an order for payment of costs, if she has no separate property. But the onus of establishing that fact lies upon her; and if she does not appear upon a motion for attachment, of which she has had notice, the Court will grant the attachment.—*Parker v. Hick*, 436.

2. *Service of Order to Pay Costs.*

The Court will not consider the question of issuing an attachment for non-payment of a sum of money ordered to be paid, till personal service of the order has been made, or it is shown that personal service is evaded.—*Williams v. Davies*, 437.

CITATION.

1. *Citation by Advertisement.—Agent.—Form of Affidavit.*

When a party is cited by advertisement, and has no agent in this country, there should be an affidavit that he has no attorney, agent, or correspondent in this country.—*Kenworthy v. Kenworthy and Watson*, 64.

2. *Administration.—Parties interested under Will cited and not Appearing.—Practice.*

Where parties interested in a testamentary paper have been cited to appear and propound it, and have not appeared and propounded it, the Court will grant administration as to an intestate, or probate of an earlier will, as the case may be, in common form: Quære, ought not the will in respect of which the parties are cited to be filed in the registry, if in the possession or power of the party applying?—*Morton v. Thorpe and Others*, 179.

3. *Will and Codicil propounded.—Persons proper to be cited.*

The plaintiffs propounded the will and codicil of Ann Wilson, under the latter of which her husband, who had survived her but a short time, took an interest. The Court allowed a citation to issue to the official liquidators of the East of England Bank, creditors of the husband, to see the codicil proved.—*Thomas Dixon and Dickenson v. Allinson and Wife*, 572.

4. *Service of Citation upon Minors.—Refusal of their Custodian to be present at Service.—Evasion of Service by Next of Kin.*

Where a citation was served upon two minors at the house where they resided, but their custodian declined to be present at the service, and an

CITATION—*continued.*

attempt was also made to serve the citation on the next of kin of the minors, but failed by reason of the process-server not being permitted to see the next of kin, the Court held the service on the minors to be sufficient.—*Lean v. Viner and Another*, 469.

CÆTERORUM GRANT OF ADMINISTRATION.

Practice.—*Administration.*—*Will of Married Woman.*—*Limited Probate.*—*Cæterorum Grant.*

A. died, leaving a will, whereby he appointed his wife sole executrix and universal legatee. She proved A.'s will, and afterwards married B., and during her coverture made a will in execution of a power vested in her, and appointed B. sole executor. Upon her death, B. took limited probate of her will, and also administration of the rest of her effects. Held, that B., as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A.—*In the goods of George Martin* (deceased), 1.

CONFIRMATION.

1. *Confirmation and Probate Act* (1858).—*Eik.*—*Seal of Court.*—*New Confirmations.*—*Practice.*

The seal of the Court will not be affixed to an eik or additional confirmation. Where the original confirmation obtained in a Commissary Court of Scotland is incomplete, it is requisite, for the purpose of obtaining the seal of the Court of Probate, that there should be a new confirmation including the whole of the personal estate in England and Scotland.—*In the goods of William Hutcheson* (deceased), 165.

2. *Scotch Confirmation.*—21 & 22 Vict. c. 56.—23 & 24 Vict. cc. 15 and 80.

The schedule (E) annexed to 21 & 22 Vict. c. 56, being the form of confirmation of an executor nominate, runs, "An inventory of the personal estate and effects of the said C. D. at the time of his death, situated, etc.;" but the Court, looking to the provisions of 23 & 24 Vict. c. 80, s. 5, Held, that the words "at the time of his death" are, since that Act, properly omitted in Scotch confirmations, and directed such a confirmation to be sealed.—*In the goods of George James Hay* (deceased), 273.

3. *Property in England and Scotland.*—21 & 22 Vict. c. 56.—*Goods of Muir*, 1 Swab. & Trist. 294, overruled.

3. Under 21 & 22 Vict. c. 56, it is not necessary that the memorandum of English domicile should be in or on the probate at the time it is issued, and where, by a *bond fide* mistake, the probate was taken for property in England only, and it afterwards turned out that there were certain railway shares in Scotland, the Court allowed a supplemental affidavit to be filed, and ordered the memorandum of English domicile to be written on the probate.—*In the goods of Joseph Allison* (deceased), 574.

COMPROMISE.

Terms of Compromise before Trial.—*Rule of Court.*—*Practice.*

When a suit is compromised before trial, the Court will not make the terms of compromise a rule of Court, as it has no power to enforce com-

COMPROMISE—continued.

pliance with the terms ; but It will make an order that the contentious proceedings be discontinued, and that the terms of compromise be filed in the Registry.—*Roadnight v. Carter*, 421.

CONDITIONAL WILL.

Will.—Conditional in Terms.—Execution after happening of Event.

A testator wrote and signed a will on the 14th of August, 1858, beginning, "In the prospect of a long journey, should God not permit me to return "to my home, I make this my last will." He afterwards went on a journey, and returned on the 25th of September, 1858. In February, 1859, he acknowledged his signature to the will in the presence of two witnesses, who duly subscribed the same. Held, that the will was entitled to probate, as it was executed after the completion of the journey contemplated.—*In the goods of William Cawthron* (deceased), 417.

CONSTRUCTION.

Will.—Bequest of Residue.—Construction.

A testatrix, by her codicil, bequeathed to A. "her wardrobe, trinkets, and "other things." Held, upon the construction of the will and codicil, that this bequest did not pass the residue.—*In the goods of Eliza Smith* (deceased), 561.

COSTS.

1. *General Rules as to Costs.—Will.—Unsuccessful Opposition by Next of Kin.—Misconduct of Residuary Legatee.*

In considering the question of costs in probate causes, the Court will be guided by the two following rules : first, if the cause of litigation takes its origin in the fault of the testator or of those interested in the residue, the costs may properly be paid out of the estate ; secondly, if there be a sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. In the present case, the Court, holding that the misconduct of the residuary legatee gave the next of kin a reasonable ground for litigation, ordered their costs to be paid out of the estate, though they had failed to prove, *inter alia*, a plea of undue influence.—*Mitchell and Mitchell v. Gurd and Kingwell*, 275.

2. *Administrator.—Order to pay Costs.—Effect of Order.—Assets.*

An order on a person as administrator to pay costs is equivalent to an order to pay them out of the deceased's estate ; and if the assets have been properly exhausted, the administrator is not bound to comply with the order.—*Williams v. Davies*, 437.

3. *Executor's Liability for Costs.—Next of Kin opposing Will.*

Where a next of kin, defendant, successfully opposed, on the ground of undue influence exercised by the executor and by the residuary legatee, a will propounded by the executor, the Court condemned the executor, plaintiff, in costs. The plaintiff was also executor under an earlier will, which appointed the same residuary legatee, under which the executor took

COSTS—continued.

nothing, and the Court refused to make an order securing out of the estate to the defendant such costs as he might not be able to recover from the plaintiff.—*Nash v. Yelloly*, 59.

4. *Amendment of Citation.*—*Revocation of Probate.*—*Interest misdescribed in Citation.*—*Costs.*

The plaintiff, in the citation to bring in probate, described himself as one of the lawful cousins and next of kin of the deceased, and upon an order obtained by the defendants that he should propound his interest, filed an act on petition, in which he alleged that he was one of the executors and residuary legatees of A., deceased, who was the lawful cousin-german of the deceased and one of his next of kin, and living at his death. Upon motion, the Court gave the plaintiff leave to amend the citation by inserting in it his correct description, upon payment of the defendants' costs up to the time of the amendment, exclusive of the costs of entering an appearance.—*Ridgway v. Abington and Others*, 3.

5. *Instructions for Will not annexed to Affidavit of Scripts.*

The omission to annex to, or mention in the affidavit of scripts, the instructions for a will, is no ground for allowing out of the estate the costs of an unsuccessful opposition to the will, if such opposition is not founded on the absence of instructions.—*Foxwell v. Poole and Wife*, 5.

6. *Intervener.*—*Costs out of Estate.*

It being doubtful whether the unsuccessful plaintiff in a suit for revocation of probate would be able to pay the costs of an intervener, who had propounded the will, the Court ordered that the intervener's costs should be paid out of the estate.—*Cross v. Cross and Others*, 292.

7. *Lapse of Time.*—*Citing to bring in Will.*—*Costs.*

H. died in 1856; his widow proved his will in 1860, and died in 1862, making D. her executor, and leaving him all her property. C., next of kin of H., cited D. to bring in the probate of H.'s will. D. propounded it, and C. pleaded thereto. The jury found the issues in favour of D. On the question of costs, the Court—Held, that though C., on the facts proved, might have had reasonable grounds for opposing the probate when taken, yet he had no right to wait till after the widow's death, who might have given important evidence, and then call in the probate, without being liable to costs in case of failure.—*Clayton v. Davis*, 290.

8. *Will established by Legatee.*—*Costs out of Estate.*

B., acting really in the interest of an infant residuary legatee, succeeded in establishing a will under which she herself took only a trifling legacy, the executor having refused to propound the will. The Court held that the circumstances of the case were such as to warrant the opposition to the will, and at first refused to make any order as to costs, but, on the representation that B. was not primarily entitled to the grant of administration with the will annexed, and so might never be in a position to repay herself the expenses of the suit, it ordered her costs to be paid out of the estate.—*Brewster v. Williams, Ball, and Others*, 62.

COSTS—continued.

9. *Misconduct.—Administrator.*

Semble, an administrator might be guilty of such misconduct as to make him personally liable for costs, but mere delay in taking out administration is not such misconduct.—*Williams v. Davies*, 437.

10. *Misconduct of party propounding Will.—Costs of opposing Will.—Costs out of the Estate.*

The costs of an unsuccessful opposition of a will allowed out of the estate, on the ground that the misconduct of those interested in setting up the will had given reasonable ground for the litigation.—*Williams v. Henry and Others*, 471.

11. *Next of Kin.—Costs of Unsuccessful Opposition to Will.—No Order as to Costs.—Reasonable Ground for Litigation.*

Where the Judge of Assize was satisfied with a verdict for the plaintiffs establishing a will, but would not have been dissatisfied with a contrary verdict, the Court refused to condemn the defendant in costs.—*Bramley and Another v. Bramley*, 430.

12. *Costs.—Unsuccessful Opposition to Will by Next of Kin.—Rule as to Condemnation in Costs.*

A party entitled to oppose a will, who avails himself of Rule 41, contentious business, will never be liable to condemnation in costs. If a party calls witnesses in support of the pleas of undue execution and incapacity, and fails, his condemnation in costs will be in the discretion of the Court on all the circumstances of the case. Failure to establish pleas of undue influence and fraud will, as a general rule, be followed by condemnation in costs.—*Summerell v. Clements*, 35.

13. *Next of Kin Condemned in Costs of a Next of Kin Cited.*

A next of kin, who unsuccessfully opposed a will, was condemned in the costs of another next of kin, whom he had cited to see proceedings, and who had appeared and pleaded, but had taken no other part.—*Cross v. Cross and others*, 292.

14. *Next of Kin.—Will.—Plea of undue Execution.—Evidence of Attesting Witnesses.*

Plaintiff, executor, propounded a will, to which the defendant, next of kin, pleaded undue execution, but gave no notice of merely cross-examining plaintiff's witnesses. At the trial the plaintiff examined one attesting witness, who proved due execution; the defendant called the other attesting witness, who negatived due execution, and the jury found a verdict establishing the will. The Court made no order as to costs.—*Ferrey v. King*, 51.

15. *Will pronounced against, on Opposition of Next of Kin.—Costs.*

A next of kin, who contested the validity of a will propounded by the widow of the deceased as the sole executrix named therein, which was pronounced against by the Court, but without condemning the widow in costs, held to be entitled to have his costs out of the estate.—*Critchell v. Critchell*, 41.

16. *Security for Costs.—Plaintiff and Defendant.*

The plaintiff applied for administration to B. on presumption of death;

COSTS—continued.

the defendant appeared in answer to a citation advertised in newspapers, and alleged that he was B. The Court refused to make any order on the defendant to give security for costs. Semble, the general rule at common law, that the defendant should not give costs, might not apply in all cases in the Court of Probate, where the nominal position of plaintiff or defendant depends on the mode in which the cause commenced.—*Robson v. Robson*, 568.

DECREE.

Varying Decree.

Semble, The Court has power to vary a previous decree.—*Bewster v. Williams and Others*, 62.

DEVISEES.

The Latter of two Wills Propounded.—Citation to see Proceedings.—Persons interested in Real Estate under Earlier Will.—Practice of Prerogative Court.—Court of Probate Act, section 61.

Where an executor propounds the later of two wills, the Court will direct a citation to issue against the devisees under the earlier will and against the heir-at-law, though already before the Court, as defendant in the suit.—*Lister and Others v. Smith*, 53.

DOMICIL.

1. Domicil of Origin.—Acquired Domicil.—Intention to Resume.

B. left Dunkerque, where she had an acquired domicil, with intention of residing in England; she got on board the packet at Calais, but before it left the harbour she was, through illness, obliged to land, and never sufficiently recovered to leave France. Held, that there was no sufficient act to give effect to the intention to resume the English domicil.—*In the goods of Emily Susan Graham Raffanel* (widow, deceased), 49.

2. Probate.—Testator, British Subject, dying abroad after 24 & 25 Vict. c. 114.—Will executed in England in Accordance with the Law of England.—Domicil.

When a British subject dies abroad after the passing of the 24 & 25 Vict. c. 114, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicil.—*In the goods of Rippon* (deceased), 177.

EVIDENCE.

1. Declarations of Family.

On the issue whether the plaintiff was the natural son of H. C., declarations of J. C., brother of H. C., were tendered as evidence of the relationship between plaintiff and H. C., but the Court held, that such declarations did not fall within the exception which admits declarations of members of the family in cases of pedigree.—*Crispin v. Dogliani*, 44.

2. Foreign Law.—Ambassador's Certificate.—Practice.

The certificate of the Hanoverian Ambassador, under the seal of the Lega-

EVIDENCE—*continued.*

tion, was admitted as evidence of the law of Hanover as to the validity of a testamentary paper.—*In the goods of Klingemann* (deceased), 18.

3. *Will Lost or Destroyed.*—*Declarations of its Contents by Testator after Execution.*

Evidence of the declarations of an alleged testator as to the contents of a will not forthcoming, made after its execution, is not admissible to prove the contents.—*Quick v. Quick and Quick*, 442.

4. *Will.*—*Parol Evidence that a Document is Testamentary.*

The intention of a testator that a duly executed paper-writing should operate as a will may be proved by parol evidence.—*In the goods of Thomas English* (deceased), 586.

EXECUTION OF WILL.

1. *Acknowledgment.*—*Memory of Attesting Witnesses Defective.*—*Due Execution Presumed.*

Where the attesting witnesses to a will, duly executed on the face of it, did not recollect having seen the testator's signature to the will when they subscribed their names as witnesses, the Court held that it was at liberty to judge from the circumstances of the case, whether it was probable that the testator's name was on the will or not at the time of the attestation, and being of opinion that it was, pronounced for the will.—*Gwillim v. Gwillim*, 200.

2. *Execution.*—*Will.*—*Attestation.*

The deceased having signed his will in the presence of a servant, the latter subscribed "Servant to Mr. Sperling," without any name. A solicitor, the other attesting witness, had directed him to sign as servant to Mr. Sperling. Held, a sufficient attestation and subscription.—*In the goods of Charles Robert Sperling*, 272.

3. *Attestation.*—*Signature.*—15 & 16 Vict. c. 24.

A testator wrote a codicil upon the first side of a half sheet of foolscap folded in the middle, and at the bottom of the sheet were written the words, "For my signature and witnesses see next side." On the fourth side of the half sheet, and, when it was unfolded, by the side with and on a level with the bottom of the codicil, were the signatures of the deceased and of two witnesses. The paper was folded when the witnesses signed their names, so that they could not see whether there was any writing on the first side of the half sheet. Held, on motion, that the codicil was not duly executed, as there was no evidence at all from which it could be presumed that anything had been written on the paper before the signatures were put there.—*In the goods of W. Hammond* (deceased), 90.

4. *Will.*—*Execution.*—*Attestation in Presence of Testator.*

A codicil was signed by a deceased, who was ill in bed in one room, and attested by two witnesses in an opposite room, but who did not see the deceased make or acknowledge her signature, or have any conversation with her respecting it. The deceased, the doors of both the rooms being open, might by raising herself in bed have seen the witnesses sign; but

EXECUTION OF WILL—*continued.*

there was no evidence that she did do so. Held, to be a bad execution, on the ground (1) that the deceased did not make or acknowledge her signature in the presence of the witnesses, and (2) that they did not attest in her presence.—*In the goods of Mary Ann Killick* (deceased), 578.

5. *Testator Deaf, Dumb, and Illiterate.*—*Evidence of Signs by which Assent to the Will was signified.*

Where probate was sought of the will of a testator who was deaf, dumb, and illiterate, the Court required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the will, before making the grant.—*In the goods of Geale* (deceased), 431.

6. *Signature at Foot or End.*—*Testamentary Dispositions written at different times.*

Where a deceased has signed his name in the presence of witnesses at the end of several clauses of a dispositive character, apparently written at different times, the presumption is that the deceased intended to give effect to the whole of what was written at the time he so made his signature.—*In the goods of Catrall* (deceased), 419.

7. *Execution.*—*Evidence of Attesting Witnesses.*—*Presumption when the Memory is imperfect.*

Where a will appears to be duly executed, and there is a complete attestation clause, the presumption *omnia rite esse acta* applies, and is not rebutted by the defective memory of the attesting witness. Where the attestation clause is incomplete, the presumption also applies, but with less force. The attestation clause to a will was informal, and the memory of the attesting witness was defective; but it was proved that the will was signed by the deceased, and that the witness had been in the room with him for the purpose of attesting it. The presumption *omnia rite esse acta* was held to prevail, and the Court pronounced for the will.—*Vinnicombe v. Butler and Another*, 580.

8. *Dispositive Part of Testamentary Instrument.*—*Position of Signature.*—15 & 16 Vict. c. 24.

Where, from the obvious sequence and sense of the context, it appears to the satisfaction of the Court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate.—*In the goods of Sarah Kimpton, widow* (deceased), 427.

9. *Execution.*—*Signature at Foot or End.*—*Signature written on last Lines of Will.*—1 Vict. c. 26, s. 9.

The testator's signature to his will was written partly across the last line but one of the will, and entirely above the last line, with the exception of one letter which touched the last line. Held, that the will was signed at the foot or end thereof.—*In the goods of Woodley* (deceased), 429.

10. *Execution.*—*Signature or Mark by Direction of Testator.*

A testator, towards the end of his life, had his usual signature engraved,
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EXECUTION OF WILL—continued.

so that it might be stamped on letters and other documents requiring his signature. He made two codicils, each of which was so stamped with his name by another person in his presence and by his direction. Held, a due execution of the codicils under the Statute of Wills.—*Jenkins v. Gaisford and Thring*, 93.

11. *Paper fastened at End of Will.—Signature of Testator and Attesting Witnesses to it.*

Where the signature of the testator and of the attesting witnesses was made, not on the paper on which the will was written, but on a piece of paper which had been attached to the paper on which the will was written: Held, to be a good execution within 15 & 16 Vict. c. 24, s. 1.

—*Cook and Another v. Lambert and Others*, 46.

EXECUTORS.

1. *Executors.—Codicil.—Executors in India.*

W. made a Will in England in 1861, and appointed B. and C. executors thereof. In May, 1862, being in India, he made a codicil, and on the 9th of June executed a paper, whereby he appointed E. and F. "my executors in this country." The Court held, that the context of the paper, giving the testator's reasons for the appointment of E. and F., showed that he did not mean them to have any power over his property in England, and granted probate to B. and C., without reserving power to E. and F.—*In the goods of Nathaniel David Scott Wallich* (deceased), 423..

2. *Executors "in India"—"in England."—Form of Probate.*

P., by his will, appointed C. and D. "executors of my will in India," and W. "sole executrix of my will in England." On an exemplification of probate granted in Calcutta to C. being sent home, probate was granted in the principal registry to W., as one of the executors of the will, reserving power of making a similar grant to the other executors in the will. The Bank of England objected to the reservation of this power; but the Court refused, on motion on behalf of W., to direct the probate to be altered.—*In the goods of Tyrrewhit Pulman*, 269.

3. *Appointment of Executors in Portugal and in England.—Probate.—Practice.*

L., who died domiciled in Portugal, made a will, containing an appointment (substitutional) of four executors "in Portugal," and another appointment (also substitutional) of four executors "in England." The plaintiff, who was named as an executor in both appointments, was resident in Portugal. The Court held, that the words "in Portugal" and "in England," were equivalent to "for Portugal" and "for England."—*Velho v. Leite*, 456.

4. *Executrix according to the tenor.—Construction.*

A. B. duly executed a testamentary paper in the form of a letter, beginning "My dear Eliza," and containing full information as to the amount of her property, with full instructions as to how she wished it to be disposed of, and concluding with these words: "I know of nothing else, my dear "Eliza, to trouble you with, and trust that this will not involve you

EXECUTORS—continued.

"in much." The Court decreed probate of the said paper-writing to E. M. A., as executrix according to the tenor.—*In the goods of Martha Manly* (deceased), 56.

5. *Executor according to Tenor.—Delivery of Fund in Testator's Life.—Payment of Debt out of Fund.*

A direction to a person to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, will not constitute him executor, according to the tenor. Semble, when a testator, in his lifetime, hands over to a person a sum of money, and directs him (out of it) to pay the expenses consequent on his sickness, and, in case of death, his funeral expenses, such money does not pass under the will.—*In the goods of Thomas Toomy* (deceased), 562.

6. *Construction.—Sole Executrix.—Revocation by Inference.*

Where the testator in his will appointed W. L. and W. B. executors, and in a codicil to the will named his wife "sole executrix of this my will," the Court held, that the appointment in the will of W. L. and W. B. as executors was revoked.—*In the goods of Daniel Lowe* (deceased), 478.

FOREIGN WILL.

Probate of Will of Foreigner.—Foreign Grants.—How far the Court will follow such Grants.

In June, 1856, the Prerogative Court of Canterbury granted administration *de bonis non* with the will annexed, of the deceased, a domiciled Portuguese, to Carniero, a substituted executor in the will, Carniero, in conjunction with the widow, being by the law of Portugal the legal representative. Carniero, in conformity with the Portuguese law, has since renounced his executorship, and one Vianna had been, by the administrator of the district, nominated executor for all legal purposes. The Court refused to grant administration *de bonis non* to Vianna, on the ground that there was no authority for an executor, who takes such a grant in an English Court, renouncing, so that there was still a legal personal representative of the deceased in this country.—*In the goods of Joaquim Jose Ferreira Veiga* (deceased), 13.

GUARDIAN.

Appointment of Guardian.—Probate.—12 Car. 2, c. 24, s. 8.—Practice.

A paper purporting to be a last will and testament duly executed, but containing simply an appointment of a guardian of his children by a father, and not disposing of personal property, nor appointing an executor, is not entitled to probate.—*In the goods of Francis Morton* (deceased), 422.

INCORPORATION.

1. *Will.—Memorandum.—Codicil.—Incorporation.*

M. executed a will in 1848, in which she requested her trinkets to be

INCORPORATION—*continued.*

divided "as I shall direct in a small memorandum." She executed a codicil in 1853, and another in 1862, which amounted to a re-execution of the will. On her death the will and two codicils, and a paper headed "memorandum of trinkets referred to in my will," were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence when the will was signed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it. Held, that the re-execution of the will by the last codicil could not make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate.—*In the goods of Lydia Mathias* (deceased), 100.

2. *Will.—Probate.—Incorporation.—Identification.*

An unexecuted paper-writing is not entitled to probate as incorporated, unless it be so described as to leave no doubt in the mind of the Court, on the circumstances proved, that it is the paper-writing referred to. The testator executed a will on the first side of a sheet of paper, leaving his property after his wife's death to be divided in manner hereinafter named, amongst his nine children. On the second and third sides of the sheet there was a list of absolute devises and bequests to his children, not signed by the testator. The writer of the will deposed that the list was written by him at the dictation of the deceased, and read over to him before the execution of the will, but the attesting witnesses only saw the first side. Held, that the intrinsic and parol evidence before the Court was not sufficient to justify it in granting probate of this list on motion.—*In the goods of John Brewis* (deceased), 473.

3. *Incorporation by Reference.—Duly Executed Paper.*

M. duly executed a paper with these words on it: "It is my wish for my dear husband to administer to the moneys; the smaller bequests L. will be so kind as to attend to." She then, in the presence of the attesting witnesses, enclosed in it two papers with writing on them, and folded and sealed the first paper. After M.'s death the envelope was found to contain two sheets of paper, containing bequests of money and other bequests in the handwriting of M., but unexecuted. When found, it appeared that the envelope had been opened and resealed; there was no evidence that the papers found in it were those originally enclosed, or that they were in existence when the envelope was executed. No other testamentary papers were found. Held, that the duly-executed paper did not refer to any written document as then existing, and, if it did so, that the document was not pointed out in such a manner as to enable the Court to ascertain its identity; that the three papers were not together entitled to probate; and that the duly-executed paper, having by itself no testamentary character, was not entitled to probate.—*Van Straubenzee and Wife v. Monck*, 6.

4. *Incorporation of Unattested Paper.*

The deceased duly executed a will and two codicils. The will contained

INCORPORATION—*continued*.

the following clause:—"I direct my executors to distribute . . . all pictures, books, and other articles according to any list or lists signed by "me." A paper was found, without any date, but which was executed before the second codicil, headed "List referred to in my will and codicils." By this paper a picture was given to a nephew; wearing apparel, one year's wages, and mourning to a servant; and directions to the executors as to the inscriptions on the tombstone. The *second* codicil commenced:—"This is a codicil to the last will and testament, with "other codicils annexed, of me. . . I hereby confirm my said last will, "with all the codicils thereto duly signed by me." Held, that the unattested paper was sufficiently identified and referred to in the will, and having been signed before the execution of the codicil, was entitled to be admitted to probate as a portion of the will confirmed by the codicil.—*In the goods of M. A. E. J. Stewart* (deceased), 142.

JURISDICTION.

Sovereign's Will.

The Court of Probate has no authority to inquire into the validity or invalidity of the will of a sovereign of this realm.—*In the goods of His late Majesty King George III.*, 199.

LOST WILL. *See* WILL.

PLEADING.

1. *Declaration.—Destruction of Will.—Affidavit of Scripts.*

When a will which has been destroyed is propounded, it is not necessary to set out the substance of the will, or to allege its destruction in the declaration. The declaration should, however, if possible, assign a particular date to the will, and an averment that the deceased in or about a certain month made his last will is *prima facie* insufficient—*Glen v. Burgess and Gover*, 43.

2. *Pleading.—Interest.—Practice.*

A caveat was warned by the widow of a deceased, and the defendants appeared thereto as universal devisees and legatees of the estate of A. B., the universal devisee and legatee of the whole estate of the deceased. The plaintiff thereupon declared, alleging an intestacy. The defendants pleaded, propounding a will, whereof A. B. was sole executrix and universal legatee. On motion for an order to amend the pleas by setting forth how they derived their interest: Held, that it was too late for the plaintiff to call upon the defendants to set forth their interest after the declaration had been delivered.—*Inkson v. Jeeves and Others*, 39.

3. *Pleading.—Leave to introduce New Plea.—Plea, "not the Will of Deceased."*—*Practice.*

Leave to introduce a new plea after issue joined will not be given unless the affidavit in support of the motion discloses such facts as, if proved in

PLEADING—*continued*.

evidence, would warrant the plea. If at the trial evidence of such facts were to be given, the Court would allow a corresponding plea to be added to the record, if it could be done without injury to the other party. Semble, a plea of "not the will of the deceased" means that the deceased signed the paper in question without intending it to operate as a testamentary instrument; and Quære, whether the terms of such a plea ought not to be more precise than "that such a paper is not the will of the deceased."—*Twells v. Clarke and Others*, 280.

4. *Pleading*.—*Not the Will of the Deceased*.—*Practice*.

The plea that the will propounded is not the will of the deceased, is too vague and indefinite, and in future, therefore, will not be allowed to be pleaded.—*Owen v. Davies*, 588.

5. *Declaration*.—*Pleading*.—*Particulars of Papers to be set up*.—*Practice*.

Where a will or codicil is propounded in a declaration in the usual form, and there is ground for suggesting that other testamentary papers, besides those specifically referred to in the declaration, may be included in the probate, the Court will order the party propounding the will or codicil to furnish the other party with particulars of the testamentary papers he intends to set up.—*Marsh and Others v. Cory*, 458.

6. *Pleading*.—*Practice*.

Plea, "that the alleged codicil was not prepared in conformity with the intentions of the deceased, and the deceased, at the time of the execution of the alleged codicil, was ignorant of the contents thereof." Held bad, on demurrer; but see *Owen v. Davies*, 588.—*Cunliffe and Ormerod v. Cross*, 37.

PRACTICE. See also **PLEADING, PROBATE**.

Suit for Revocation of Probate.—*Intervener*.—*Right to begin*.—*Costs*.—*New Trial*.

In a suit for revocation of probate, the party propounding the will must begin, though the plaintiff has declared, alleging an intestacy. Verdict of a jury establishing a will, although the surviving attesting witness swore that when she subscribed her name the testatrix was dead, upheld on the evidence.

PRESUMPTION OF DEATH.

A. was not heard of from December, 1846. More than seven years afterwards, namely, in September, 1854, he would, if alive, have become entitled, by the death of a relative, to a share in her residuary personal estate. This share had, in his absence, been paid into the account of the Accountant-General of the Court of Chancery, who, it was stated, was prepared to pay it to A.'s administrators. A. had no other property in this country. The Court declined to make a general grant of administration to A.'s brother, on the ground that A. must be presumed to have died before the death of his relative, but made a grant limited to substantiate proceedings in the Court of Chancery.—*In the goods of Charles Turner* (deceased), 476.

PROBATE.

1. *Two Testamentary Papers.—Different Executors.—Probate.*

D., on the 3rd of January, 1853, devised and bequeathed all his real and personal estate to P., and appointed him "sole executor of this my will." In March, 1862, by a paper purporting to be his last will, he devised and bequeathed two houses as described and their appurtenances to G., and made G. "sole executor of this my will." The Court held that the two executors were jointly entitled to probate of both papers.—*Geaves v. Price*, 71.

2. *Two Testamentary Papers.—Different Executors.—Probate.*

G., a widow, by will, dated February 25th, 1861, bequeathed certain specified property, over which she had a power of appointment under her marriage settlement, between her four sons, R., L., W., and G., and made R. sole executor. By another testamentary paper, dated the 28th day of October, 1862, she left all the property of which she might die possessed between her three sons, L., W., and G., and appointed W. sole executor. The Court held that both papers ought to be included in the probate.—*In the goods of Graham* (deceased), 69.

3. *Duly executed Paper, Testamentary on the Face.—Absence of Animus Testandi.—Evidence.*

A duly executed paper, testamentary on the face of it, is not entitled to probate, if it is clearly proved, by parol evidence, that it was executed by the deceased without any intention that it should affect the disposition of his property after death. The Court of Probate, however, will not hold itself bound by the verdict of a jury to that effect, but will itself weigh the evidence on which such verdict was founded.—*Lister and Others v. Smith*, 282.

4. *Will.—Probate of Copy.—Proof.*

Where a person, who has himself destroyed a testamentary paper after the death of the alleged testator, asks for probate of the substance thereof, as contained in a copy or otherwise, the Court will expect the fullest and most satisfactory proof of all the facts necessary to be established.—*Moore v. Whitehouse*, 567.

5. *Probate.—Practice.—Probate in Facsimile.*

Where a will, on the face of it, had been executed in 1858 and subscribed by two legatees named in it as witnesses, and was re-executed in 1860 and attested by different witnesses, and after the death of the testatrix was found with the first attestation clause and the names of the witnesses to it cancelled, but there was no evidence to show the date of the cancellation, the Court refused to exclude the part cancelled from probate, and directed the probate to go in facsimile.—*In the goods of Esther Smith* (deceased), 589.

6. *Codicil.—Erroneous Reference to a Previous Codicil.*

The testator duly executed a will and five codicils. The first executed codicil, dated the 25th March, 1843, commenced, "This is the second codicil to the will of A.," and ended, "In all other respects I confirm my said will, save only so far as the same is unrevoked by my first codicil

PROBATE—*continued.*

thereto, and I do hereby confirm the said codicil." It did not appear that the testator had executed any codicil to his will prior to this one, described as the second codicil to his will; but his solicitor, after the date of the will, and before the date of this codicil, forwarded to him for his perusal a draft codicil, which, when he prepared this codicil, he erroneously concluded had been executed, and therefore described it as a second codicil. The draft codicil was, after the testator's death, found tied up in a parcel containing the will and five executed codicils. Held, that the draft codicil was not sufficiently identified as the paper intended to be referred to by the deceased in his first executed codicil, and could not be admitted to probate.—*In the goods of John Allnutt* (deceased), 167.

7. Embodying in Probate Documents referred to in Will.—Practice.

- L. by his will bequeathed certain leaseholds to trustees upon the same trusts as declared in a certain indenture of settlement. With a slight exception, the whole of these leaseholds were included in the settlement, which was of great length. The Court granted probate without requiring the settlement to be embodied in it, upon an affidavit being filed describing and giving the date of the settlement.—*In the goods of the Marquis of Lansdowne* (deceased), 194.

8. Probate.—Embodying Papers referred to by Will.

- A will made in November, 1861, contained a clause,—“I make no specific bequest to my brother's children, etc. Upon this subject I refer my wife to my annulled will, dated the 11th of February, 1851.” The annulled will contained no bequest to those children; in it the testator stated that in the present aspect of affairs there was every prospect that they would be left well provided for; but that if any reverse should overtake them, he trusted and felt sure that his wife would share her all with them. Upon motion for probate of the will of November, 1861, held, that the annulled will did not raise any implied trust in favour of the said children, and that therefore it need not be embodied in the probate.—*In the goods of Ouchterlony* (deceased), 175.

RECEIVER.

Practice.—Citation of Heir-at-law.—Appointment of Receiver of Real Estate.—20 & 21 Vict. c. 77, s. 71.

- Before a receiver of real estate will be appointed by the Court, under the 20 & 21 Vict. c. 77, s. 71, it is necessary that it should appear on affidavit, that the heir-at-law, or devisee, or other person having or pretending interest in the real estate, has been cited under the 61st section.—*Purdey and Others v. Field and Another*, 576.

RENUNCIATION.

2. Executor.—Renunciation.

- The renunciation of an executor need not be under seal.—*In the goods of Boyle* (deceased), 426.

2. Married Woman.—Undue Service of Citation.—Subsequent Renunciation.

RENUNCIATION—continued.

Where a citation has not been duly served on a married woman, the Court will act upon a renunciation subsequently executed by herself and husband.—*Herbert v. Sheill and others*, 479.

3. *Renunciation by Executor after Intermeddling.—Renunciation Invalid.—Record of it on Probate Cancelled.*

Where one of several executors, who after intermeddling in his testator's estate, executed a renunciation, and probate had been granted to his co-executors, the Court, on the application of renunciant, declared his renunciation to be invalid, and directed the record of it on the probate to be cancelled.—*In the goods of George Badenach* (deceased), 465.

4. *Renunciation and Consent.—Power of Attorney.*

Where the party entitled to the grant, being resident out of England, had by a power of attorney specially authorized his brother to execute for him an instrument of renunciation and consent, the Court acted on a renunciation and consent so executed.—*In the goods of Sarah Rosser* (deceased), 490.

REVOCAION.

1. *Will.—Revocation.—Cutting Codicil.*

H. duly executed a will, appointing executors, on six sheets, by signing her name at the end of each of the first five sheets, and at the foot of the will on the sixth sheet. The testimonium clauses stated that she had so executed the will. H. afterwards executed a codicil, which was written at the back of the last sheet of the will, containing an appointment of executors. H. subsequently cut off her signatures at the end of each of the first five sheets, and drew her pen through her signature at the foot of the will on sheet six. There was satisfactory evidence that she intended to revoke the will but not the codicil. Held, that H. having cut off a portion of the will, which, though not in fact, was treated by her as a material part of it, had done an act of revocation sufficient to satisfy sec. 20 of 1 Vict. c. 26. Probate granted of the codicil alone.—*In the goods of Ann Durrant Harris, widow* (deceased), 485.

2. *Mutilation of Prior Will.—Dependent Relative Revocation.*

The testatrix duly executed a will in 1855, and in 1862 she signed another will, being a copy of the former one, with the exception of bequests to a niece, but which was not duly attested. In 1864 she cut out the names of the attesting witnesses to the earlier will, in the presence of a fellow-servant. Both documents were retained in her possession until her death. Held, that the doctrine of dependent relative revocation applied, and that the will of 1855 was entitled to probate.—*In the goods of Elizabeth Middleton* (deceased), 583.

3. *Revocation.—Partial Revocation.—Will.—Codicil.—Cutting off Part of Will.*

Where a will and codicil were in the testator's custody, and the will was found mutilated after his death, in the absence of evidence the presumption is, that it was mutilated by the testator after the execution of the codicil. W. executed her will on two sheets of paper, signing her name,

REVOCATION—continued.

in the presence of three witnesses, at the foot of the first side of the second sheet, and again at the top of the second side of the same sheet. The attesting witnesses subscribed their names in her presence underneath her signature at the top of the second side of the second sheet. Her signature and that of the attesting witnesses also appeared at the bottom of the second, third, and fourth sides of the first sheet. Subsequently to the execution of the will she duly executed a codicil, which occupied the lower part of the second side of the second sheet, below the signatures of the witnesses to the will. The codicil commenced—"A codicil. Since writing this my will," etc. The last sentence of the last side of the first sheet was, "Five thousand pounds Three per cent. Consols shall revert to the further purposes of my will, as follows in the second sheet of my will." On the death of W. these two sheets were found, but part of the top of the second sheet had been cut off, including the testatrix's signature on the upper part of the second side, the names of the attesting witnesses being untouched. The dispositive part of the will, contained in the second sheet so cut, did not carry out the intention expressed at the end of the first sheet. Held, that in the absence of evidence the presumption was, that the will was mutilated after the execution of the codicil; that the will and codicil, when executed, formed one testament, which had been mutilated by cutting off a portion, but that from the manner in which it was cut, the preservation of the rest of the will and codicil, etc., the testatrix only intended to revoke so much of the will as was cut off.—*Christmas and Christmas v. Whin-gates*, 81.

4. Revocation of Will.—Will.—Codicil.—Presumptive Revocation of Codicil.

- B. duly executed a will on the 3rd of July, 1852, and on the 16th of October, 1857, a codicil, described as "a codicil to my will of the 3rd of July, 1852," by which codicil he left a legacy to N., and otherwise confirmed his will. B. handed the codicil to N., and it remained in her custody till B.'s death, on the 7th of January, 1863. In September, 1860, the deceased expressed his displeasure with certain legatees under the will, and in the presence of N. took the will out of a box, cut off his own signature and those of the attesting witnesses, and replaced the mutilated paper in the box, where it was found at his death. At various times between September, 1860, and his death, B. gave certain instructions to his solicitors with respect to another will, but nothing was ever settled or completed. Three or four days before his death, deceased executed a bond securing to N. a monthly payment of £4. On motion for administration with the codicil annexed, the Court refused to make the grant on motion, at least without citing those interested in an intestacy, and intimated its opinion that there was nothing to rebut the presumption that the revocation of the will was a revocation of the codicil.—*In the goods of William Walter Holmes Dutton* (deceased), 66.

See ADMINISTRATION, 15.

SECURITY FOR COSTS. *See* Costs, 16.

TRIAL.

1. *Mode of Trial.—Refusal of Jury.—Probate Act, Section 35.*

Where the cause, from the nature of the issues of facts raised, is a more proper one to be tried before the Court itself than by a jury, the Court will, on the application of one of the parties, direct it to be heard without a jury, unless such application is opposed by the heir-at-law.—*Quick v. Quick and Another*, 460.

2. *Mode of Trial.—Will.—Question of Presumptive Revocation.—Refusal of Jury.*

Where the main question to be decided was presumptive revocation of a will, the Court (the defendants who were not heirs-at-law opposing) directed the cause to be tried by the Court without a jury.—*Smith v. Hoad and Others*, 462.

3. *Postponement of Trial.—Absence of Witness.—Practice.*

Quære, whether a party who is entitled to have a trial postponed, in order that he may have an opportunity of cross-examining any adverse witness in Court instead of on commission. The Court refused an application to postpone a trial from the Spring to the Summer Assizes, made on the ground that the plaintiff, a material witness on her own behalf (who was charged with having procured the execution of the will she propounded by undue influence), and whom the defendant wished to cross-examine in Court instead of on commission, would be prevented by illness from being present at the trial, inasmuch as it was probable, from the medical testimony, that the witness would die before the Summer Assizes.—*Williams v. Henry*, 463.

TRUSTEE.

Will.—Executor.—Trustee.—Power to Appoint other Trustees.

B. made C. his executor and trustee, with power to appoint by deed or will other persons as co-trustees or succeeding trustees. B. died; C. did not take probate, but by will, referring to B.'s will, appointed E. and F. to be succeeding trustees in respect of B.'s will, after his (C.'s) death. F. proved C.'s will, and was called upon, as executor substituted according to the tenor, to take probate of B.'s will. The Court held, that in the language of the two wills the distinction between trustee and executor was so marked, that F. could not be called upon to take probate of B.'s will.—*Moss and others v. Bardwell*, 187.

WILL.

1. *Residuary Legatee.—Instructions.—Legacies omitted.*

B. gave certain instructions to G. for her will, of which she made him, G., residuary legatee. After the will was drafted, B. said she wished to leave three other legacies, naming the legatees. G. said it should be attended to; but subsequently read over the will to B. without adding such legacies, and B. signed it. On the trial of certain issues at Exeter, the jury found that deceased was of sound mind, and negatived undue

WILL—*continued.*

influence; that B. had given the instructions for the further legacies; that at the time of execution they were absent from B.'s mind, but present to G.'s mind, who knew that they were absent from B.'s mind. Byles, J., thereupon directed a verdict on the issue, "will or not will of "deceased," to be entered for the plaintiffs opposing the will, with leave to G. to move to set aside. After argument, the Court held that the paper writing so executed was the will of the deceased, and made the rule absolute to enter verdict for the defendant on that issue.—*Mitchell and Mitchell v. Gard and Kingwell*, 75.

3. *Proof of lost Will by Parol.*—*Nature of Evidence.*—*Brown v. Brown*, 8 *Ell. & Bl.*, considered.—*Wills Act*.

Where probate has been asked of the substance of a lost will, as contained in the parol evidence of witnesses, the Court has never acted but on the fullest and most stringent proof. Where, six or seven years after the death of the alleged testator, the substance of a will was offered for probate as contained in the testimony of the widow, solely interested under the alleged document, her niece, and an attorney's clerk connected by marriage with the widow, the document after execution having been alleged to be in the custody of the latter, but not being forthcoming, the Court held that there was not sufficient proof for it to act upon; but intimated that, if it had thought otherwise, it would have required an argument on the legality of giving effect to a will proved by parol evidence since the Wills Act. Quære, whether in *Brown v. Brown*, and other cases decided since the Wills Act, the attention of the Court has been sufficiently called to the operation of that statute in this respect.—*Wharram v. Wharram*, 301.

3. *Administration called in.*—*Sum and Substance of Will propounded.*—*Grant of Administration to the Residuary Legatee, who had established the Will.*

When the substance of a will is propounded, the first point to be ascertained is whether such a will was duly executed. If that is established, the next point is, whether it was in existence at the death of the deceased. If it was not, then the *primâ facie* presumption that it was destroyed by the deceased, with intention to revoke, arises, which may be rebutted by further evidence. In the present case the Court was satisfied, on the evidence, that the defendant, who had taken out letters of administration, had possessed himself of the will after the death of the deceased, and had suppressed or destroyed it, and therefore decreed letters of administration with the will annexed, as contained in a draft.—*Podmore v. Whatton*, 449.

5. *Will.*—*Married Woman.*—*Testamentary Paper in Form of a Deed of Gift.*—*Practice.*

A married woman, having a power to appoint by will under her marriage settlement, executed on the same day two instruments, the first purporting to be a deed of gift to her sister of all her property, the second, after reciting the contents of the first, expressing a wish that her sister

WILL—*continued.*

should pay certain bequests out of the property. These two papers were handed by the deceased after their execution, enclosed in an envelope, to the sister in whose custody they remained till her death. It was shown that the deceased had afterwards spoken of these papers as constituting her will, and that the property referred to in them had remained under her control up to her death. Held, that the papers were testamentary, and entitled to be proved.—*In the goods of Eleanor Webb* (deceased), 482.

5. *Two Wills partially Inconsistent.*—*Probate.*—*Practice.*—Stoddart v. Grant and Others, 1 *Macq.'s H. of Lords Cases*, 169.

Where a testator executed two wills partially consistent and partially inconsistent, by the first will disposing of certain property over which she had a power of appointment, bequeathing certain legacies and the residue, and appointing W. H. and J. H. executors; and by the second will, which contained no revocatory clause, bequeathing certain specific legacies, disposing of the residue, and appointing the said J. H. and two other persons executors: The Court granted probate to the said J. H. of the two instruments, so far as they were not inconsistent, reserving power to W. H. and the two other executors appointed in the second will to come in and take probate.—*In the goods of Budd* (deceased), 196.

See also PROBATE.

INDEX TO DIVORCE CASES.

ADJOURNMENT.

Where the petitioner's counsel opened evidence which was admissible on the record for the jury but took the other parties by surprise, the Judge adjourned the trial, and, as the adjournment was made necessary by the conduct of both parties, refused to make any order as to the costs of such adjournment.—*Bancroft v. Bancroft and Rumney*, 610.

ADULTERY. See CONNIVANCE; DELAY; DESERTION.

Semble: Adultery condoned may be revived by subsequent misconduct and improprieties short of, but leading to, adultery.—*Winscom v. Winscom and Plowden*, 380.

AFFIDAVIT. See NEW TRIAL.

1. The affidavit to found a motion to make absolute a decree *nisi* should show that search was made in the registry up to a recent date.—*Stone v. Stone and Brownrigg*, 113.
2. Affidavits in a cause must be entitled strictly as the cause itself is entitled.—*Sutherland (falsely called Cromie) v. Cromie*, 210.

APPEAL.

1. No appeal lies from any order of the Court as to costs only.—*Glennie v. Glennie and Bowles*, 109.
2. On appeal from the refusal of the Judge Ordinary to make absolute a rule *nisi* for a new trial the other party is properly brought into Court by notice, and the full Court will proceed either to discharge or make absolute the rule, but the appellant must begin.—*Yeatman v. Yeatman*, 361.
3. When a question to determine the admissibility of evidence has been decided by a Judge presiding at a trial by jury, the decision of the Judge on such question may be reviewed by a court of appeal. *Sed quere*.—*Fitzgerald v. Fitzgerald* (Full Court), 400.

APPEARANCE.

1. A respondent having entered an absolute appearance cannot afterwards plead to the jurisdiction of the Court, nor can such an objection be raised by act on petition. *Quere*, whether such objection could be taken at the hearing of the cause?—*Forster v. Forster and Berridge*, 144.
2. An appearance may be entered in a matrimonial suit at any time within twenty-one days from the service of the citation.—*Child v. Child*, 537.

ATTACHMENT.

1. The Court will decree an attachment in pursuance of an agreement

ATTACHMENT—*continued.*

made between the parties, and has power to enforce an attachment after the petition has been dismissed.—*Bremner v. Bremner and Brett*, 378.

ALIMONY. *See ATTACHMENT.*

1. The wife cannot, generally speaking, include in her husband's income liable to alimony any purely voluntary allowance made to him, though possibly there might be circumstances in which the wife might be entitled to alimony out of income to which the husband might have no strict legal right.—*Haviland v. Haviland*, 114.
2. Where the husband obtains a decree of judicial separation by reason of the wife's cruelty, the Court will expect some provision by way of permanent alimony to be made for the wife.—*Prichard v. Prichard*, 523; overruling *White v. White*, 1 Sw. & Tr. 591; and *Dart v. Dart*, *ante*, 209.
3. Alimony, pending suit, ceases when the wife's adultery is conclusively proved, though other undecided matters in controversy may keep the suit alive.—*Wells v. Wells and Hudson*, 542; with which compare *Nicholson v. Nicholson and Ratcliffe*, 214.
4. Where the husband had no property, but was entitled to a legacy of £500, payable eleven months after the application, the Court refused to allot alimony pending suit.—*Brown v. Brown and Simpson*, 217.
5. In part answer to a petition for alimony *pendente lite* the husband alleged that the wife had taken from his house furniture, etc., to the value of £800 or £1000. The Court refused to make any order on such a state of things, the wife declining to accept the sum offered by the husband, but allowed the wife to reply to the above allegation in the answer.—*Bremner v. Bremner and Brett*, 249.
6. The extent or degree of cruelty proved ought not to influence the amount of alimony allotted.—*Hooper v. Hooper*, 251.
7. It is not sufficient, in an answer to a petition for alimony, to specify the amount of net annual income derived from trade; the gross annual income and the deductions must be specified. It is also necessary to specify the gross rental of house property, and to give particulars of the charges and outgoings in respect of which deduction is claimed.—*Nokes v. Nokes*, 529.
8. The wife applied for permanent alimony, the husband stated on affidavit that, since the petition for alimony pending suit and answer had been filed, he had parted with his business (which was the principal source of income) for a yearly payment of £300 for seven years and five per cent. on the value of warehouse, stock in trade, debts, etc. The Court held that in allotting alimony the £300 yearly must be taken as income.—*Moore v. Moore*, 606.

CHILD. *See CRUELTY*, 1. **DAMAGES.**

1. In certain circumstances, where the marriage is dissolved by reason of the mother's cruelty, the Court will order part of the income of her money in settlement to her own use to be paid to a relative of a child of the marriage for the benefit of the child.—*Webster v. Webster and Mitford*, 106.

CHILD—*continued*.

2. Where a mother had obtained a decree for judicial separation by reason of the father's cruelty, the Court refused to give her the custody of one of the children, who was an idiot and of the age of twelve years, on the ground that the Court would only deprive the father of the custody of his child in favour of the innocent mother when the company of the child would be a solace to her.—*Cooke v. Cooke*, 248.
3. Provision, out of damages, for a child born after the separation of the petitioner and respondent.—*Callwell v. Callwell and Kennedy*, 259.
4. Where a father petitions for a decree of nullity of the marriage of his child by reason of undue publication of banns, such child must be cited as well as the other party to the *de facto* marriage.—*Wells v. Collam* (falsely called Wells), 364.
5. On application for an order for access to children pending suit, the Court will require to be satisfied that the motive is natural love or affection for the children, and that the applicant has no indirect object in view; the Court will also consider the convenience of all parties in the circumstances and how the children would probably be affected if the order were made.—*Codrington v. Codrington and Anderson* (Full Court), 496.

COMPROMISE OF SUIT. See CONNIVANCE, 1. DAMAGES, 2.

1. Where the wife, a petitioner in a suit for judicial separation, had entered into a compromise by which the record was withdrawn from the jury and terms of a separation were to be settled by an arbitrator, it was held, on appeal, by the full Court that the petitioner was not at liberty to repudiate the agreement, except on the ground of fraud or of such an error in the terms of the agreement that she ought not to be bound by it.—*Hooper v. Hooper*, 251.
2. On a wife's petition for dissolution of marriage certain issues of cruelty and adultery came on for trial, on the 12th March, 1861, when an agreement was signed by the respective counsel by which, *inter alia*, a separation deed was to be executed, and the petitioner agreed not to take further proceedings in this Court. The petitioner moved the Court to set down the case again for trial, on the ground that the agreement had not been signed by counsel with her consent. The full Court confirmed the Judge Ordinary's rejection of this motion. In 1863 the petitioner filed a fresh petition alleging the same acts of adultery as in the former petition, certain other acts, previous to March, 1861, which she alleged had only come to her knowledge in the early part of 1863, certain other acts of adultery since March, 1861, and various acts of cruelty, some alleged to be different from those contained in the former petition. In the result, the Court held that the petitioner was bound by the agreement of March, 1861, not to take any proceedings in the Court in respect of any matter before that date; and, as the subsequent acts of adultery, to which the Court held the agreement did not extend, would not of themselves support the wife's petition for dissolution, refused to give any directions as to the mode of trial.—*Rowley v. Rowley*, 338.

CONDONATION.

1. When after gross acts of violence the wife returned to the husband's house, but refused to return to his bed unless she were restored to her proper position in his household, the Court held that she had been willing to condone the cruelty, but had annexed a condition precedent which had not been complied with, and that there was no condonation.—*Cooke v. Cooke*, 126.

Slighter acts than would have sufficed to found an original suit are sufficient to revive condoned cruelty, 126.

S. C. on appeal before the Full Court, 246.

2. *Semble*: condoned adultery may be revived by acts of impropriety short of actual adultery.—*Winscom v. Winscom and Plowden*, 380.

CONNIVANCE.

1. In March, 1861, G. petitioned for dissolution by reason of his wife's adultery with H. An arrangement was made that a sum of money in lieu of costs and damages should be paid by H. into the hands of a third person to abide the result of the trial. In June, 1861, G. signed a paper by which he undertook, in consideration of the receipt of £3000 from H. as costs and damages, and upon H. securing to him the further sum of £4000, to withdraw his petition. It was found that the record could not be withdrawn, but, on the jury being sworn, no evidence was given, and a verdict was taken for the respondents. The parties failed to agree upon terms of a separation deed between G. and his wife, and H. refused to pay the £4000. In June, 1862, G. filed a petition for dissolution by reason of his wife's adultery with H. in and since August, 1861. H., among other things, pleaded connivance and conduct conducing to the adultery; and the Court held that the bargain by H. to give up his legal remedy for the previous adultery for a sum of money, without stipulation as to his wife's future conduct, amounted to consent and connivance in respect of the adultery now complained of, and dismissed the petition.—*Gipps v. Gipps and Hume*, 116.

2. A. married B. in 1833. A., since 1835, lived apart from B. her husband, under an ordinary separation deed. About 1842 B. commenced an adulterous cohabitation with C., which continued till the date of the trial. A. was aware of the fact of the adulterous cohabitation in 1843 and thenceforward. A. petitioned for judicial separation, and issues and connivance and undue delay were found against her by a special jury. A rule *nisi* for a new trial, on the ground of insufficient evidence of connivance, was granted, but discharged on argument.—*Boulting v. Boulting*, 329.

3. Connivance is a defence to a claim for damages, and the co-respondent who obtains a verdict on that issue is entitled to be dismissed from the suit, though the jury may have assessed substantial damages.—*Ellyatt v. Ellyatt, Taylor, and Halse*, 503.

CONJUGAL RIGHTS.

1. An agreement between husband and wife to live separate is no bar to a suit for restitution of conjugal rights.—*Spering v. Spering*, 211.

CONJUGAL RIGHTS—*continued*.

2. What matters answer to petition for may contain.—*Griffith v. Griffith*, 355.

CO-RESPONDENT. *See* ADJOURNMENT.

1. His liability to costs. *See* Costs, 4, 8.
2. *Semble*: on the name of a particular adulterer being given by a husband in compliance with an order for particulars of a general charge of adultery, the Court would, on the application of such alleged adulterer, make him a co-respondent.—*Codrington v. Codrington and Anderson*, 368.

But where the husband applied to make such alleged adulterer a co-respondent after the wife had obtained an order for a commission to examine him as a witness, the Court refused, doubting the *bona fides* of the application, *S. C.*

3. The co-respondent cannot, in his own person, object to a decree *nisi* being made absolute; and, *semble*, if the Court is satisfied that an intervenor after decree *nisi* is merely the creature of the co-respondent, it will proceed to make the decree absolute.—*Clements v. Clements and Thomas* (Eames and Burroughs intervening), 394.
4. Where the petition is dismissed on a verdict of connivance against the husband, damages cannot be enforced against the co-respondent, though the jury may have assessed them.—*Ellyatt v. Ellyatt, Taylor, and Halse*, 503.
5. Where the co-respondent does not appear, the jury must assess damages, though they find a verdict on the issue of adultery raised between husband and wife in favour of the latter.—*Stone v. Stone and Appleton*, 608.
6. Where damages were asked for, the Judge, on summons at the instance of the co-respondent, ordered the petitioner to bring into the registry letters written by the respondent to him, or to file an affidavit that he had no such letters, or that they contained no such matter as suggested by the affidavits in support of the summons.—*Pollard v. Pollard and Hemming*, 613.

COSTS. *See* ADJOURNMENT. COURT.

1. Where the husband, petitioner, has had a verdict found against him, he must pay the costs of the first trial before a rule for a new trial will be made absolute.—*Jago v. Jago and Graham*, 103.
2. No appeal lies as to costs only. Where the wife fails, she will not be entitled to taxed costs beyond the sum of money paid into Court by the husband on the order of the Registrar. *Semble*: if dissatisfied with the Registrar's order, the wife's solicitor might have applied to the Judge Ordinary to vary the order. The Court rejected a motion for an order on the husband, petitioner, to pay the balance of the wife's costs above the sum paid into Court, and condemned her solicitor in the costs.—*Glennie v. Glennie and Bowles*, 109.
3. When a new trial is granted on the application of the wife, the Court cannot, if she has no means, impose upon her the terms of payment of costs, but the husband must pay the costs of both parties.—*Nicholson v. Nicholson and Ratcliffe*, 214.

COSTS—continued.

4. When, in a suit for dissolution of marriage, the co-respondent is condemned in costs, he is liable to the costs of the petitioner and respondent incurred in obtaining an alteration of the marriage settlement.—*Gill v. Gill and Hogg*, 359.

But if part of such an application fails, and the costs of that part can be separated in taxation from the other costs, they ought not to be thrown on the co-respondent.—*Stone v. Stone and Brownrigg*, 372.

5. If a father petitions for a decree of nullity of his son's marriage, the *de facto* wife is not entitled to have her costs taxed against the petitioner.—*Wells v. Wells and Cottam*, 364.
6. Nor, in the particular circumstances of the case, would the Court condemn the *de facto* husband in the costs of the *de facto* wife, though it intimated that the 51st section of the Divorce Act gave it power so to do in proper circumstances, *S. C.*, 593.
7. The Court will not interfere with the discretion of the Registrar in respect of particular items allowed or disallowed on taxation, unless it can be shown that the taxation proceeded upon an erroneous principle.—*Cooke v. Cooke*, 374.

8. When the co-respondent is found to have been guilty of adultery, he is not, as a matter of course, relieved from payment of the costs of that issue, merely by reason of the husband having been guilty of such misconduct as to induce the Court to dismiss the petition.—*Bremner v. Bremner and Brett*, 378.

But where the petition was dismissed on the ground of connivance, the Court made no order as to costs between the petitioner and co-respondent.—*Ellyatt v. Ellyatt, Taylor, and Halse*, 503.

Where a co-respondent has acted with imprudence with a person whom he knew to be a married woman, he will be left to pay his own costs, though the issue of adultery may be found in his favour.—*Carstairs v. Carstairs, Dickenson, and Others*, 538.

Compare *Seddon v. Seddon and Doyle*, 2 Swab. & Trist. 640.

9. Where the husband had paid a sum into the Registry to meet the wife's costs of the hearing, and had died before the cause came to hearing, the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors, and for the payment to them of such costs out of the fund in the Registry, with leave to the solicitors of the husband's executor to attend the taxation.—*Hall v. Hall*, 390.
10. Where the wife had petitioned against the husband, and the proceedings are ended before hearing by her return to cohabitation, the petition will be dismissed, on the husband's application, only on the payment of taxed costs.—*Cooper v. Cooper*, 392.
11. Where the wife succeeds in establishing a legal defence to her husband's petition, she will be entitled to costs, though she be found guilty of adultery, and no order on the husband has been obtained to pay money into the Registry to meet her costs of trial.—*Ellyatt v. Ellyatt, Taylor, and Halse*, 503.

COSTS—*continued.*

12. Where the Queen's Proctor does not intervene in his official capacity, but as one of the public, the Court cannot condemn the parties to the suit in his costs.—*Bowen v. Bowen and Evans*, 530.
13. Where a person has been fined for contempt of court by threatening a suitor, but submits himself before the fine has been estreated, he is liable to the costs of the application, and the fine will be estreated on his refusal to pay such costs.—*Re Mulock*, 599.
14. Where the husband's petition is dismissed, and the wife's costs of the hearing exceed the sum secured or paid into the Registry to meet them, the husband is liable to pay the balance, but the application should be made on summons and not on motion; if made on motion, the husband will be liable for so much only of the costs of the application as would have been incurred on summons.—*Cooke v. Cooke and Allen*, 603.
15. Where there were cross suits, and the marriage was dissolved on the ground of the wife's adultery, the Court held that the husband was not liable for the costs of the wife's petition, inasmuch as she had not taken the ordinary steps to get them taxed previous to the final determination that she had been guilty of adultery.—*Rolt v. Rolt*, 604.

COURT. See APPEAL, 2, 3. COSTS, 13.

1. By the 51st section of the Divorce Act the question of costs is in the absolute discretion of the Court which hears the cause, and there can be no appeal on the subject of costs only.—*Glennie v. Glennie and Bowles*, 109.
2. Will not interfere with the discretion of the Registrar in respect of particular items allowed or disallowed on taxation, unless it can be shown that the taxation proceeded upon an erroneous principle.—*Cooke v. Cooke*, 374.
3. Threatening a suitor is a contempt of court, and a person guilty of such contempt, and not submitting himself, will be fined.—*Re Mulock*, 599.

CRUELTY. See ALIMONY, 2, 6. CONDONATION. DELAY.

From 1851 to January, 1855, a wife received great cruelty at the hands of her husband; besides acts of personal violence, he excluded her from the head of his table and from the management of his household. On various occasions, between January, 1855, and September, 1856, the wife left and returned to her husband's house; but after January, 1855, refused to return to her husband's bedroom unless she were replaced in her proper position in the household, which the husband refused to do. In September, 1856, she left, and did not return to her husband's house. In September, 1857, an arrangement was made that she should pay to her husband a portion of income settled to her separate use, and that he should allow the children from time to time to visit her. She paid the money, but in the early part of 1862, three years had elapsed since the husband had allowed any of the children to visit her, and he then refused to do so, though she was very ill. In July, 1862, she petitioned for judicial separation; the answer of the husband denied the cruelty, and alleged condonation and undue delay. Held, that the wife's return

CRUELTY—*continued.*

to the house showed a willingness to condone; but that she annexed, as she had a right to do, a condition precedent, with which the husband never complied, therefore there was no condonation so as to bar her suit for judicial separation; but that, if there had been, the husband's conduct and demeanour whilst she remained in the house would have sufficed to revive the gross acts of cruelty; less being sufficient to destroy condonation than to found an original suit. That the whole of the transactions subsequent to the wife leaving the house in September, 1856, grew out of and were connected with the misconduct of the husband, and raised no suspicion that the suit was brought in 1862 with any indirect object.—*Cooke v. Cooke*, 126.

Sentence of Judge Ordinary sustained in appeal to Full Court, 246.

2. Where one act of violence is of such a character as to found a reasonable apprehension of further violence in case of cohabitation, the wife is entitled to the protection of the Matrimonial Court.—*Reeves v. Reeves*, 139.
3. Though lapse of time is not an absolute bar to the wife's suit for judicial separation on the ground of cruelty, yet, if in connection with other circumstances, it satisfies the Court that the suit is brought not for the protection of the petitioner, but for some collateral purpose, the petition will be dismissed.—*Matthews v. Matthews* (Full Court), 161.
4. Charges of attempts at unnatural connection and infection, as cruelty, not sustained.—*N. v. N.*, 234.
5. The Court will not interfere to protect the wife from mere unhappiness resulting from an ill-assorted marriage, nor from the destruction of domestic comforts caused by drunkenness.—*Hudson v. Hudson*, 314.
6. Where the issue of cruelty is submitted to a jury, the Court will not grant a new trial unless it is satisfied that there was error or miscarriage on the part of the jury. That, on the evidence, the Court might not have arrived at the same conclusion as the jury did, is not sufficient.—*Scott v. Scott*, 320.
7. Where the evidence in support of a petition on the ground of cruelty, discloses facts from which the respondent's insanity may be inferred, the Court will require to be satisfied that such facts admit of a different explanation before it will make a decree in favour of the petitioner.—*Hall v. Hall*, 347.
8. What matters in answer to a petition for restitution of conjugal rights are admissible.—*Griffith v. Griffith*, 355.
9. Though the physical effects of the wife's violence may not generally be so serious to the personal safety of the husband, as the effects of his violence towards her, yet the moral result of the wife's violence to all the proper relations of married life is so serious, that the Court will interfere and not drive the husband to the necessity of meeting force by force.—*Prichard v. Prichard*, 523.
10. Any distinct species of cruelty intended to be proved must be stated in the petition, and evidence in support of it will not be admissible under a general charge of "otherwise treating with great cruelty."—*Squires v. Squires*, 541.

DAMAGES. See CO-RESPONDENT, 4, 5, 6. CHILD, 3. CONNIVANCE, 1, 3.

1. £5000 assessed for damages ordered by the Court to be paid to the petitioner's solicitor; £1000 thereof to go to the petitioner in lieu of extra costs not recoverable against the co-respondent; out of the residue an annuity of £120 to be purchased for respondent's life, to be paid to her *dum casta vixerit*; in case of forfeiture to her daughters; and the remainder to be invested in equal annuities for her daughters.—*Forster v. Forster and Berridge*, 158.
2. The Court will not recognise any agreement between the parties to fix the amount of damages, irrespective of the assessment of the jury.—*Callwell v. Callwell and Kennedy*, 259.
3. £2500 assessed for damages to be settled, after payment of petitioner's surplus costs, on the respondent *dum casta vixerit* and for life, with remainder to the two children of the marriage.—*Narracott v. Narracott and Hesketh*, 408.

DECREE, VARIATION OF TERMS OF. See PRACTICE, 4.

DECREE NISI. See AFFIDAVIT, 1. CO-RESPONDENT, 3.

1. Where an appearance had been entered by a friend of the co-respondent (against whom £5000 damages had been awarded), for the purpose of showing cause against a decree *nisi* being made absolute, on the ground that there were material facts in the case which were not brought to the notice of the Court, but most of the material facts had been put on record by the parties, and were not established at the trial, and the intervener had not established by affidavit a single fact of importance, the Court declined to suspend its decree, and condemned the intervener in the costs occasioned by the intervention.—*Forster v. Forster and Berridge* (Graham intervening), 151.
2. Where the petitioner in a suit for dissolution has obtained the verdict of a jury, it is no ground for refusing to make a decree *nisi*, that notice of an intended application for a new trial has been given.—*Stone v. Stone and Appleton*, 212.
3. Any person, and the Queen's Proctor as one of the public, may enter an appearance and file affidavits in opposition to a decree *nisi* being made absolute, at any time before it is made absolute.—*Bowen v. Bowen and Evans*, 530.
4. But, *semble*, if the Court is satisfied that the intervener is merely the creature of one of the respondents, it will proceed to make the decree *nisi* absolute.—*Clements v. Clements and Thomas* (Eames and Burroughs intervening), 394.

DELAY.

1. Unreasonable delay in bringing the suit is no plea, strictly speaking, to a petition for judicial separation, though in connection with other facts delay in bringing a petition may lead to the dismissal of the suit.—*Cooke v. Cooke*, 126; *Matthews v. Matthews*, 161; *Boulting v. Boulting*, 329.
2. Course open to respondent if the petitioner delay to set the cause down for trial, or otherwise to prosecute the petition.—*Hare v. Hare*, 218; *Stuart v. Stuart*, 219.

DELAY—*continued*.

3. Delay in bringing a suit for decree of nullity by reason of impotence or malformation, must be satisfactorily explained, or the petition will be dismissed.—*E. v. T. (falsely called E.)*, 313; *M. (falsely called B.) v. B.*, 550.
4. The wife finally left her husband, who had been guilty of cruelty and adultery, in 1844; no subsequent acts of adultery were proved; till shortly after the petition was filed, the wife had had no means of taking legal proceedings; the husband had led a wandering life without any regular employment: Held, that the wife had not been guilty of unreasonable delay in presenting her petition.—*Harrison v. Harrison*, 362.

DESERTION.

1. Husband and wife in domestic service at time of marriage. Shortly before the marriage the husband went into service elsewhere, leaving the wife in the same service, where she soon contracted an adulterous connection with another man servant: Held, that the husband had not been guilty of desertion or wilful separation within the meaning of the 31st section of the Divorce Act.—*Davies v. Davies and Hughes*, 221.
2. Where the intention of husband clearly was not to live with the wife (he was in fact carrying on an illicit intercourse before and after marriage), the Court held that it amounted to desertion on his part, though the wife actually left the house in which they last resided together, and, after she was aware of the adulterous connection, refused to return unless she were satisfied that such connection was at an end.—*Graves v. Graves*, 350.
3. The husband is bound to give the wife the security and comfort of his home and society so far as his position and business will admit, and if the Court is satisfied that the husband has failed in his duty, it will, in the exercise of the discretion given by the 31st section of the Divorce Act, refuse to dissolve the marriage by reason of the wife's adultery.—*Jeffreys v. Jeffreys and Smith*, 493.
4. A separation deed, which was never acted upon either to a husband or wife living apart, nor as to certain stipulations about money matters contained therein, does not deprive the husband's subsequently leaving the wife against her will, of the character of desertion.—*Cock v. Cock*, 514.
5. Where the husband has been guilty of adultery and of desertion for two years and upwards, his offer to return to cohabitation can be no bar to the wife's petition on the ground of adultery and desertion.—*Basing v. Basing*, 516.
6. The facts which constitute the desertion as a ground for a decree, vary with the circumstances and mode of life of the married persons. So long as a husband treats his wife as a wife by maintaining such degree and manner of intercourse as might be expected from a husband of his calling and means, he cannot be said to have deserted her.—*Williams v. Williams*, 547.

EVIDENCE. See NEW TRIAL, 1, 3. PRACTICE, 2.

1. In a suit by a wife for judicial separation on the ground of cruelty the wife was asked, in cross-examination, whether she had originally instructed her attorney to petition for restitution of conjugal rights. The question was objected to, and the objection over-ruled.—*Maccan v. Maccan*, 142.
2. Statements in writing by a patient to a medical man describing symptoms of the illness upon which the medical man has advised the patient are not admissible as evidence on behalf of the writer.—*Witt v. Witt and Klindworth*, 143.
3. A respondent who, in his answer, merely denies the cruelty charged in the petition, may cross-examine the petitioner as to the general conduct with the view of impeaching her credit, but her answer as to any matters not bearing on the issue cannot be contradicted.—*Baker v. Baker*, 213.
4. *Semble*: The Court will not pronounce a decree of nullity by reason of the man's alleged impotence without a report of sworn medical inspectors as to the condition of the woman petitioning.—*S. (falsely called E.) v. E.*, 240.
5. Where the wife petitions for judicial separation by reason of adultery and cruelty, her evidence is inadmissible on the issue of cruelty.—*Hudson v. Hudson*, 315.
6. The deposition of a deceased witness is admissible on condition, not only of its having been taken under sanction of an oath, but also of sufficient notice having been given to the party against whom it is tendered, to have enabled him to attend and cross-examine.—*Fitzgerald v. Fitzgerald*, 398. S. C. on appeal, 400.
7. A co-respondent traversed the alleged adultery in the petition, and charged the husband with cruelty to his wife. During the petitioner's case, some witnesses were asked as to the general terms on which he lived with his wife. On the part of the co-respondent, witnesses deposed to particular acts of violence committed on the wife by the husband, and the Court admitted evidence in reply limited to those particular acts and occasions.—*Narracott v. Narracott and Hesketh*, 408.
8. In certain circumstances, the Court has exercised the power given by the 43d section of the Divorce Act by examining the petitioner on oath as to some of the facts necessary to establish his petition.—*Tatham v. Tatham and Nutt*, 511.
9. M. petitioned for a decree of nullity of marriage by reason of the alleged frigidity etc., of H. the man; H. traversed the alleged frigidity. At the hearing, H. gave evidence that the non-consummation was caused by the pain felt, and distress expressed, by M. when he attempted to have connection. The evidence was objected to, on the ground that such causes of non-consummation should have been alleged in the answer; but the Court admitted the evidence, saying, that evidence in reply might be called if it appeared that the petitioner was taken by surprise.—*M— (falsely called H—) v. H—*, 517.
10. Of foreign marriage and of identity of parties.—*Rooker v. Rooker and Newton*, 526.

EVIDENCE—*continued.*

11. A petition alleged that the respondent had, by neglecting the petitioner, by violently pushing her, by striking her with his fist, by depriving her of food, and otherwise, treated her with great cruelty. There was no appearance. The Court refused to admit evidence under the above allegation that the respondent had infected the petitioner with the venereal disease.—*Squires v. Squires*, 541.

FATHER. See CHILD, 2, 4, 5. COSTS, 5. PRACTICE, 13.

HUSBAND. See ALIMONY. CHILD, 4. CONNIVANCE, 1. COSTS, 1, 2, 3, 4, 6, 8, 9, 10, 11. DESERTION. CRUELTY, 9. DAMAGES, 2. NEW TRIAL, 2. SETTLEMENTS.

INSANITY.

Where the evidence on behalf of the petitioner discloses facts from which the respondent's insanity may be inferred the Court will require to be satisfied that such facts admit of a different explanation before it will make a decree in favour of the petitioner.—*Hall v. Hall*, 348.

LETTERS. See EVIDENCE, 2. PRACTICE, 15, 19.

MARRIAGE. See NULLITY OF. SETTLEMENTS.

MINOR.

Cited as a respondent, cannot appear in person, but must appear by Guardian.—*Wells v. Cottam* (falsely called Wells), 364.

MOTHER. See CHILD, 1, 2, 5.

NEW TRIAL. See COMPROMISE. EVIDENCE, 6.

1. On trial of an issue of adultery the jury found a verdict against the petitioner. On affidavit by a witness called on petitioner's behalf that she had made a mistake in an important date in giving her evidence, the Court directed a new trial; the error, if there were one, being likely, in the opinion of the Court, to have disturbed the judgment and misled the minds of the jury.—*Jago v. Jago and Graham*, 103.
2. Where a new trial is granted on the application of the wife the Court cannot impose upon her the terms of payment of costs, if she has no means, but the husband must pay the costs of both parties.—*Nicholson v. Nicholson and Ratcliffe*, 215.
3. Where the issue of cruelty is submitted to a jury the Court will not grant a new trial unless it is satisfied that there was error or miscarriage on the part of the jury. That, on the evidence, the Court might not with certainty have arrived at the same conclusion as the jury did is not sufficient. That the party asking for a new trial could produce corroborative evidence not produced or not in his possession at the first trial is no ground for granting a new trial.—*Scott v. Scott*, 320.
4. Where it is necessary for the petitioner to establish two points in order

NEW TRIAL—*continued.*

to obtain the prayer of the petition, the Court would not, even if it were dissatisfied with the verdict of the jury on one point, send that down for a new trial, because, if a different verdict were found on that point, it would not be sufficient ground for the relief prayed.—*Fitzgerald v. Fitzgerald*, 400; *Carlidge v. Carlidge*, 406.

5. It is no ground for a new trial that the jury has been discharged on an issue of fact which ultimately would be a question for the opinion of the Court itself under the 31st section of the Divorce. Query, as to excessive damages.—*Narracott v. Narracott and Hesketh*, 408.
6. An inconsistent verdict is not necessarily a ground for a new trial. It would be so if it prevented the Court from ascertaining the substantial opinion of the jury.—*Ellyatt v. Ellyatt, Taylor, and Halse*, 503.

NULLITY OF MARRIAGE. See COSTS, 5, 6. EVIDENCE, 9. PRACTICE, 13.

1. Where, after a decree of dissolution of marriage, one of the parties to such marriage was married in fact within the time limited by 20 & 21 Vict. c. 85, s. 57, and during the lifetime of the other party to the marriage, the Court held the latter *de facto* marriage to be null and void in law.—*Chichester v. Mure* (falsely called Chichester), 223; *Rogers*, otherwise *Briscoe* (falsely called Holmshaw) v. *Holmshaw*, 509.
2. A woman married E. on the 22nd July, and lived with him till 23rd September. She petitioned for a decree of nullity by reason of his inability to consummate the marriage. E. did not appear, but had submitted to inspection; their report negatived any apparent or incurable defect on his part, but ascribed the non-consummation to incapacity caused by a long-continued habit of self-abuse, which (as further explained by their *vivâ voce* evidence) they considered might possibly, but not probably, be cured; the question being one of moral restraint. There was no report of inspectors as to the condition of the woman, and their *vivâ voce* evidence was equivocal as to proof of non-consummation from examination of her person. The Court refused to make the decree. *Semble*: the Court would not, at all events, make such a decree without a report from sworn medical inspectors as to the condition of the woman.—*S—* (falsely called E—) v. *E—*, 240.
3. Where a delay of some years occurs in bringing a suit for nullity by reason of malformation the Court will require an explanation of such delay.—*E—* v. *T—* (falsely called T—), 312.
4. M. petitioned for a decree of nullity of marriage by reason of the alleged frigidity, etc. of H., the man. H. traversed the alleged frigidity, etc. At the hearing H. gave evidence that the non-consummation was caused by the pain felt, and distress expressed, by M. when he attempted to have connection. The marriage took place in December, 1860, and the parties cohabited for nearly three years. The medical certificate stated the virginity of the woman, and the apparent potency of the man. The woman gave evidence of ineffectual attempts on the part of the man, and denied any unwillingness on her part.

NULLITY OF MARRIAGE—continued.

The Court held, that it could not presume impotence in such circumstances, with a cohabitation short of three years; but if the presumption arose it was rebutted by the man's account of the cause of non-consummation, to which, along with other circumstances in evidence, the Court gave faith, and refused the decree of nullity, but suspended any positive decree, on the expressed hope that the woman would return to cohabitation.—*M—* (falsely called *H—*) v. *H—*, 517.

Subsequently, on motion founded on affidavits that the woman had returned to cohabitation, and that the marriage remained unconsummated, the respondent not appearing, the Court made the decree of nullity.—*S. C.*, 592.

5. Lapse of time in bringing a petition for nullity by reason of the man's impotence, and apparent indirect motives in petitioning, will disentitle the plaintiffs to a decree, though the Court may be satisfied that the marriage has not been consummated by reason of the man's impotence.—*M—* (falsely called *B—*) v. *B—*, 550.

PETITIONER. See COMPROMISE. COSTS, 1, 4, 5. DELAY. NEW TRIAL, 4. NULLITY OF MARRIAGE, 2, 3, 5.

In certain circumstances, the Court may exercise the power given to it by the 43rd section of the Divorce Act, by calling the petitioner and examining him on oath in support of his own petition.—*Tatham v. Tatham and Nutt*, 511.

PRACTICE. See ADJOURNMENT. AFFIDAVIT. ALIMONY, 7. APPEAL. APPEARANCE. ATTACHMENT. CHILD, 4. COSTS. CRUELTY, 8, 10. DECREE NISI, 1, 2, 3. EVIDENCE. MINOR. NEW TRIAL. NULLITY OF MARRIAGE, 4.

1. If counsel for the respondent call witnesses, he ought to comment on evidence on behalf of the petitioners before calling his own witnesses.—*Glennie v. Glennie and Bowles*, 110.
2. If counsel for the co-respondent proceed to examine a witness called on behalf of the respondent, he adopts such witness as his own, and cannot cross-examine him.—*S. C.*, 110.
3. Query, whether any document can be put in evidence after the conclusion of the hearing of a cause, and before sentence given, unless by the consent of the parties.—*Gipps v. Gipps and Hume*, 120.
4. When the Judge Ordinary, by his decree, dismissed a petition, and an appeal from such decree was prosecuted in the House of Lords, the Judge Ordinary varied the terms of such decree, in order to bring the substantial question in the case more clearly before the House of Lords.—*Gipps v. Gipps and Hume*, 125.
5. When a copy of a petition, praying for an order as to settled property, had been served on the respondent, who was resident abroad, and had not appeared in the suit, the Court altered the settlement in his absence.

Query, whether a mere notice of intention to make such application would have been sufficient.—*Lawrence v. Lawrence*, 207.

PRACTICE—continued.

6. When leave is given to amend a petition to which there has been no appearance, it must be re-served.—*Spilsbury v. Spilsbury*, 210.
7. Where a respondent has been cited by advertisement, and has not appeared, and leave is given to amend the petition, the amended petition need not be advertised.—*Smith v. Smith*, 216.
8. In cases directed to be tried by the Court itself, if the petitioner delay setting the cause down for trial the respondent may obtain the leave of the Court to do so.—*Hare v. Hare*, 218.
9. If the petitioner delay filing the record settled for the jury, and setting down the cause as ready for trial for the space of one month from the final settling of the record, the respondent may file his record, and set the cause down as ready for trial (Rule 24); or the respondent may take a rule to shew cause why the petition should not be dismissed.—*Stuart v. Stuart*, 219.
10. The wife petitioned for judicial separation, alleging cruelty and adultery, which the husband's answer traversed. The cause was tried by the Court itself, and an objection taken to the admissibility of the petitioner's evidence as to cruelty. The Court ruled that, on the issues as they stood, it was inadmissible; but struck out the issue of adultery as an immaterial issue, counsel for the husband not objecting.—*Hudson v. Hudson*, 314.
11. When the same issues are raised in cross suits, the Court will generally stay one, and that without reference to their relative positions in the cause list. In such case, if a commission to examine witnesses is necessary, it will be drawn in such a form as that the evidence shall be available in the stayed suit should that come to a hearing.—*Osborne v. Osborne*; *Osborne v. Osborne and Martelli*, 327.
12. The question for the Court is wholly different where a pleading is demurred to, and where it is moved to order the amendment or reformation of a pleading; in the latter case, it will consider what form is convenient in the circumstances, and whether the party applying is likely to be injured or obscured in his view of the case by the pleading as it stands, without prejudging the question of the sufficiency of the allegations if established in evidence.—*Griffith v. Griffith*, 355.
13. If a father petitions in his own right for a decree of nullity of his child's marriage, he must make both the parties to the *de facto* marriage respondents to the petition.—*Wells v. Cottam* (falsely called *Wells*), 364.
14. In answer to an order for particulars of a general charge of adultery, the petitioner gave the name of M. as the alleged adulterer in respect of such general charge; on application for further particulars as to time and place, it was stated that the petitioner depended on written admissions of the wife, and the Judge Ordinary ordered that if better particulars were not given to respondent's attorney earlier than ten days before the trial, the petitioner should be confined to documentary evidence.—*Codrington v. Codrington and Anderson*, 368.
15. The Court will, in certain circumstances, order the petitioner to bring

PRACTICE—continued.

- into the Registry letters written by the respondent to him, that the Court may judge whether the respondent should be allowed to inspect such letters.—*Winscom v. Winscom and Plowden*, 383.
16. Where the husband had paid a sum into the Registry to meet the wife's costs of the hearing, and had died a little before the time appointed for the hearing, the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors, and for the payment to them of such taxed costs out of the fund in the Registry, with leave to the solicitors of the husband's executor to attend the taxation.—*Hall v. Hall*, 390.
 17. On the husband's petition for dissolution and damages, in which the issue of his cruelty was raised by the co-respondent, the Judge Ordinary discharged the jury on the issue of cruelty; and, on motion for new trial, held that he had rightly so done, inasmuch as the question of cruelty was ultimately one for the opinion of the Court under the 31st section of the Divorce Act.—*Narracott v. Narracott and Hesketh*, 408.
 18. Appearance may be entered in a matrimonial suit at any time within twenty-one days of the service of the citation.—*Child v. Child*, 537.
 19. Where damages were asked for by the petitioner, the Judge, on summons, at the instance of the co-respondent, ordered the petitioner to bring into the Registry letters written by the respondent to him, or to file an affidavit that he had no such letters, or that they contained no such matters as suggested by the affidavits in support of the summons.—*Pollard v. Pollard and Hemming*, 613.

QUEEN'S PROCTOR. See COSTS, 12. DECREE NISI, 3.

RESPONDENT. See COMPROMISE. COSTS, 5, 6. INSANITY. NULLITY OF MARRIAGE, 4.

SETTLEMENTS. See COSTS, 4.

1. The Court will require full information of the husband's means when asked to vary the interest of the wife in her money in settlement in favour of the child. When the marriage had been dissolved by reason of the wife's adultery, and she was entitled to a life interest in a sum of about £2900 Consols, her own money in settlement, and the husband had scarce any income, the Court ordered the trustees of the settlement to pay £20 yearly to the paternal grandfather of the only child of the marriage, a daughter, for her use and benefit.—*Webster v. Webster and Mitford*, 106.
2. The Court will vary a marriage settlement in the absence of the respondent when he has been served with the petition asking for an order to that effect. Query, whether mere notice of an intended application would have been sufficient.—*Lawrence v. Lawrence*, 207.
3. After a decree of dissolution by reason of the wife's adultery, the Court, considering her sufficiently otherwise provided for, ordered all money recovered by the trustees of the settlement under a covenant of the hus-

SETTLEMENTS—*continued.*

band's to pay an annuity of £400 to the wife for life, to be applied to the education and maintenance of the children of the petitioner and respondent born previously to the separation.—*Callwell v. Callwell and Kennedy*, 259.

4. Where money was payable to the respondent under the covenant of W. M., party to the settlement, the Court ordered it to be applied for the benefit of the child of the marriage, as such third person and the petitioner should think fit, and after the death of the petitioner ordered the trustees to hold the money covenanted to be paid by the executors of the said W. M., and apply the same and the interest thereof, according to the settlement, as if the respondent were then naturally dead.—*Gill v. Gill and Hogg*, 359.
5. An interest under a marriage settlement which may never be realized is not property in "reversion" within the 45th section of the Divorce Act. *Semble*: moneys settled in the hands of the trustees of a separation deed between husband and wife might be dealt with under 22 & 23 Vict. c. 61, s. 5.—*Stone v. Stone and Brownrigg*, 372.

TAXATION OF COSTS. *See* COSTS, 7, 9, 10.

VERDICT. *See* NEW TRIAL, 1, 3, 4, 5, 6.

WIFE. *See* ADULTERY. ALIMONY. CONDONATION. CONNIVANCE, 2. COSTS, 2, 3, 9, 10, 11. CRUELTY. DESEPTION. EVIDENCE, 5. NEW TRIAL, 2. SETTLEMENTS.

ERRATA ET CORRIGENDA.

Page 117, line 1, *for* "H" *read* "G."

From page 251 to page 259, *for* "1863" *read* "1860."

Page 303, line 15, *dele* "in."

Page 317, line 7, *for* "consortism" *read* "consortium."

Page 320, line 4 of head-note, *for* "corroborate" *read* "corroborative."

Page 333, line 6, *for* "whether" *read* "whatever."

Page 364, *in place of* 1st paragraph of head-note *read* "If a father petitions for a decree of nullity of his child's marriage he must make both parties to the *de facto* marriage respondents to the petition."

Page 413, line 24, *for* "King" *read* "Rex."

Page 418, line 12 from bottom, *for* "Lance" *read* "Lancee."

Page 441, line 15 from bottom, *strike out* "17 & 18 Vict. c. 77."

Page 482, line 5 from bottom, *for* "made" *read* "make."

Page 496, line 13, *for* "on" *read* "of."

Page 505, line 11, *for* "86" *read* "85."

Page 512, line 7, *for* "Louis" *read* "Louisa."

Page 514, in head-note, *after* "separation" *read* "deed."

Page 517, line 10, *for* "this" *read* "the."

Page 544, at bottom, *for* "Baldri" *read* "Baldie."

Page 545, at top, *for* "163" *read* "165."

Page 556, *for* "1863" *read* "1864."

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